Strong

Reverse.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~454~~ 220

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL REEVES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED APRIL 12, 1869.

2 Bell 409

2 Story C.C. 69

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1 Circuit Court.—March term, 1868.

UNITED STATES OF AMERICA:

Be it remembered that the circuit court of the United States for the district of West Tennessee was begun and held at the federal court-rooms, in the city of Memphis, on the first Monday in, it being the second day of, March, in the year of our Lord one thousend eight hundred and sixty-eight.

Present and presiding, the Hon. Connally F. Trigg, United States district judge for the districts of Tennessee; present, also, Abram S. Mitchell, clerk.

2 *Declaration.*

U. S. OF AMERICA, *6th Judicial Circuit:*

In the circuit court of the United States for the district of West Tenn.—September term, 1867.

SAMUEL REEVES, PL'FF,
vs.
THE MEMPHIS AND CHARLESTON RAILROAD Company, defendants.

The plaintiff, Samuel Reeves, who is a citizen of the State of Arkansas, by his attorneys, Wright & McKissick, complains of the defendant, "The Memphis and Charleston Railroad Company," a body politic and corporate, incorporated by the legislature of the State of Tennessee, having their business situs in said State of Tennessee, to wit, in the district aforesaid, within the jurisdiction of this court, of a plea of trespass in the case—

3 For that the said defendant, before and at the time of the delivery of the goods and chattels to them as hereinafter next mentioned, were, and from thence hitherto hath been, and still are, common-carriers of goods and chattels for hire, to wit, from Chattanooga to the city of Memphis, Tennessee, to wit, at the district aforesaid. And whereas, also, the said plaintiff, whilst the said defendants were such common-carriers as aforesaid, to wit, on the 1st day of March, 1867, at Chattanooga, Tennessee, to wit, at the district aforesaid, caused to be delivered to the said defendants, and the said defendants then and there, by their agents thereunto duly and properly authorized, accepted & received of and from the said plaintiff certain goods, to wit, one hundred and sixty-three boxes of manufactured tobacco of the said plaintiff, of great value, to wit, of the value of twenty thousand ($20,000) dollars, to be safely and securely carried and conveyed by the said defendants, from Chattanooga aforesaid to Memphis aforesaid,

4 and there, to wit, at the district aforesaid, safely & securely to be delivered for the said plaintiff for certain reasonable reward to the said defendants in that behalf. Yet the said defendants not regarding their said duty as such common-carriers as aforesaid, but contriving and fradulently intending craftily and subtly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the said 163 boxes of manufactured tobacco aforesaid, from Chattanooga, Tennessee, aforesaid, to the city of Memphis, Tennessee, aforesaid, nor there, to wit, at the said city of Memphis, at, to wit, the district aforesaid, safely or securely deliver the same for the said plaintiff; but on the contrary thereof, the said defendants so

being such common-carriers as aforesaid, so carelessly and negligently behaved and conducted themselves in the premises, that by & through the carelessness, negligence, & default of the said defendants in
5 the premises, the said 163 boxes of manufactured tobacco, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, became and were wholly lost to the said plaintiff, to wit, at the district aforesaid.

And whereas, also, heretofore, to wit, on the day and year aforesaid, to wit, at Chattanooga, Tenn., at, to wit, the district aforesaid, the said plaintiff, at the special instance and request of the said defendants, caused to be delivered to the said defendants a certain other quantity of manufactured tobacco, to wit, 163 boxes of manufactured tobacco of the like quantity, quality, description, and value as that in the first count mentioned of the said plaintiff, to be taken care of and safely & securely carried and conveyed by the said defendants to the city of Memphis, Tenn., aforesaid, and there, to wit, at Memphis aforesaid, to be safely & securely delivered by the said defendants, for the said plaintiff, within a reasonable time, then next following, for certain hire and reward to the said defendants in that behalf; and although the said defend-
6 ants then and there accepted, and had and received the said last-mentioned 163 boxes of manufactured tobacco, for the purpose & on the terms aforesaid, and although a reasonable time for the carriage and conveyance and delivery thereof aforesaid hath long since elapsed, yet the said defendants, not regarding their said duty in that behalf, but contriving and fraudulently intending craftily & subtly to deceive & defraud the said plaintiff in this respect, did not nor would within such reasonable time as aforesaid, or at any time afterwards (although often requested so to do), take care of or safely or securely carry and convey the last-mentioned 163 boxes of manufactured tobacco aforesaid, to Memphis, Tennessee, aforesaid, nor then, to wit, at Memphis aforesaid, at, to wit, the district aforesaid, safely and securely deliver the same for the said plaintiff, but hath hitherto wholly neglected and refused so to do; and by means of the negligence
7 and improper conduct of the s'd defendants in that behalf, the said last-mentioned 163 boxes of manufactured tobacco aforesaid have not been delivered to or for the said plaintiff, at Memphis aforesaid, or elsewhere, and are wholly lost to the said plaintiff, to wit, at, to wit, the district aforesaid.

And whereas, also, afterwards, to wit, on the day and year aforesaid, at Chattanooga, Tenn., aforesaid, to wit, at the district aforesaid, the said defendants, at their special instance and request, had the care and custody of a certain other quantity of manufactured tobacco, to wit, 163 boxes of other manufactured tobacco, of the quantity, quality, description, and value as that in the said first count mentioned of the said plaintiff; yet the said defendants, not regarding their duty in that behalf, did not nor would, whilst they so have the care and custody of the said last-mentioned 163 boxes of manufactured tobacco, take due and proper care of the same or any part thereof, but wholly neglected so to do, and took such bad care thereof that afterwards, to wit [to wit],
8 on the day and year aforesaid, the said last-mentioned 163 boxes of manufactured tobacco became and were wholly lost to the said plaintiff, to wit, at the district aforesaid.

Wherefore, and by reason of the premises, the plaintiff says he has been wronged and injured to his damage twenty thousand ($20,000) dollars; and therefore he sues.

WRIGHT & McKISSICK,
Attorneys for Pl'tf.

Whereupon afterwards, to wit, on the said 20th day of July, A. D. 1867, the plaintiff aforesaid sued out a writ of summons against the said defendants, "The Memphis and Charleston Railroad Company," which said "summons" is in the words and figures following, to wit:

9 *Summons.*

The President of the United States of America to the marshall of West Tennessee, greeting:

You are hereby commanded to summon the Memphis and Charleston Railroad Company, citizen of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States in the sixth circuit for the district of West Tennessee, at Memphis, on the first Monday in September next, and then and there to answer Samuel Reeves of a pleas trespass on the case.

Herein fail not, and have you then and there this writ.

Witness Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States this first Monday in March, in the year 1867, and of independence of the United States the ninety-first.

A. S. MITCHELL, *Clerk*,
ISAAC MORRISON, *D. C.*

10 Whereupon the plaintiff aforesaid then & there, to wit, on the 20th day of July, 1867, in our court aforesaid, filed the following bond for the prosecution of their suit aforesaid, to wit:

Bond.

Know all men by these presents, that we, Galbreath, Stewart & Co., are held and firmly bound unto the Memphis and Charleston Railroad Company in the sum of two hundred and fifty dollars, to be void on condition that Samuel Reeves do pay and satisfy all costs that may accrue in that behalf in the prosecution of a suit this day commenced by him in the circuit court of the United States for the district of West Tennessee, at Memphis, against said Memphis and Charleston Railroad Company, on failure of plaintiff to prosecute his said suit with effect; and also on failure of the defendants, if convicted, to pay said costs.

Witness my hand & seal this 20th day of July, 1867.

GALBREATH, STEWART & CO.

11 Which said summons was afterwards returned into said court with the following "return" thereon endorsed:

Return.

"Came to hand July 22nd, 1867, and served same day on Geo. Robertson, esq., sec'y & treasurer of M. &. C. r'r'd, & delivered to him copy of pl't'f's declaration."

J. M. TOMENY, *U. S. Marshall*,
By J. M. CUNN, *Deputy.*

And thereupon, afterwards, at September term, 1867, and upon the 2nd day of said month, the following order was made in said cause:

SAMUEL REEVES
vs.
THE MEMPHIS & CHARLESTON RAILROAD COMPANY.

The plaintiff, by attorney, comes and moves the court for leave to file

an additional count to his declaration, which is granted; and said additional count was thereupon filed.

12 *Additional count to declaration.—Filed, by leave of court, Sept. 2, 1867.*

In the circuit court for the district of West Tennessee.

SAMUEL REEVES
v.
THE MEMPHIS & CHARLESTON RAILROAD COMPANY.

Additional count to plaintiff's declaration, filed by leave of the court.

For that whereas, also, heretofore, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, the said plaintiff delivered to the said defendants, & the said defendants being then and there common-carriers for hire as aforesaid, rec'd from the plaintiff at Chattanooga, at, to wit, the district aforesaid, a certain other quantity of tobacco, to wit, 163 boxes of manufactured tobacco, of the value of $20,000, to be conveyed by the said defendants on their railroad cars from Chattanooga, in the State of Tennessee, to Memphis, in the State of Tenn., at, to wit,
13 the district aforesaid, and there to be delivered to the plaintiff for a certain reasonable reward to be thereupon paid by the said plaintiff to the said defendants in that behalf, and the said defendants then and there took; accepted, and received the same accordingly for the purposes last aforesaid; and it then and there became the duty of the said defendants to take due and proper care of the said last-mentioned tobacco, and in and about the carriage and conveyance of the same, and the delivery thereof as aforesaid. Yet the said defendants, not regarding their said duty in that behalf, but contriving and intending to injure the said plaintiff, afterwards, to wit, on the day and year last aforesaid, at Chattanooga, to wit, the district aforesaid, took so little and such bad and improper care of the said last-mentioned 163 boxes of manufactured tobacco, and in and about the carriage and conveyance of the same and de-
14 livery thereof as aforesaid so negligently, carelessly, and improperly conducted themselves in this behalf that, for want, &c., of due care in the said defendants, their agents and servants in that behalf, the said railroad cars of the said defendants, with the same tobacco of the plaintiff loaded therein, became submerged in the water, whereby and by means whereof the same tobacco of the plaintiff was then and there wilted, spoiled, injured, and damaged, to the damage of the plaintiff $20,000; and therefore he sues.

WRIGHT & McKISSICK,
Att'ys for Pl'ff.

And thereupon, afterwards, to wit, on the 12 day of September, 1867, the defendant filed a plea in said cause in the words and figures following, to wit:

15 *Plea.*

In the circuit court of the United States for the district of West Tennessee, sixth judicial circuit.—Sept. term, 1867.

SAMUEL REEVES
v.
THE MEMPHIS AND CHARLESTON RAILROAD COMPANY.

And the said defendant, by attorney, comes & defends the wrong and

injury, when, &c., & says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country, &c.

HUMES & McRAE,
Att'ys for Def'ts.

And the plaintiff doth the like.

WRIGHT & McKISSICK, *for Pl'ff.*

16 And thereupon, afterwards, to wit, at the March term, 1868, of said court, and upon the 18th day of said month, the following proceedings were had in said cause, to wit:

SAMUEL REEVES
v.
MEMPHIS & CHARLESTON RAILROAD COMPANY. } Case.

This day came the parties by their attorneys; and thereupon, to try the issues joined between the parties, came a jury of good and lawful men, to wit, C. M. Carrol, B. T. Plumner, Alfred Cooley, A. H. Rose, J. W. Griffith, W. T. Lincoln, Z. K. Hawley, Isaac Happek, A. H. Affleck, A. H. Grisham, J. T. McCoy, & P. H. Johnson, who being elected, sworn, and charged well and truly to try the said issue and a true verdict to render according to the evidence, and there not being time to conclude the trial of this cause on to-day, the same is adjourned over to to-morrow morning.

17 And afterwards, to with, on the 19th day of said month of March, at the term aforesaid, the following further order was made in said cause:

SAMUEL REEVES
v.
THE MEMPHIS & CHARLESTON RAILROAD COMPANY. } Case.

This day came the parties by their attorneys, and also the jury empannelled in this cause on yesterday, and the trial of this cause was resumed; but there not being time to conclude the trial on to-day, the same is adjourned over to to-morrow morning.

And upon the 21st day of said month, the following further order was made in said cause:

SAMUEL REEVES
v.
MEMPHIS & CHARLESTON RAILROAD COMPANY. } Case.

This day came the parties by their attorneys, & also the jury empannelled in this cause, when the trial of the same was resumed; and there not being time to conclude the trial on to-day, the same is adjourned over to Monday morning next.

18 And thereupon, afterwards, to wit, on the 24th day of March, 1868, at the term of said court last aforesaid, the following further order was made in said cause, to wit:

SAMUEL REEVES
v.
MEMPHIS & CHARLESTON RAILROAD COMPANY. } Case.

This day came the parties by their attorneys, and also the jury empanneled in this cause; and, for satisfactory reasons appearing to the court, the same is adjourned over until to-morrow morning.

And afterwards, to wit, on the 25th day of said month of March, 1868, the following further order was made in said cause, to wit:

SAMUEL REEVES
v.
THE MEMPHIS & CHARLESTON RAILROAD COMPANY. } Case.

This day came the parties by their attorneys, and also the jury empannelled in this cause; and, for satisfactory reasons appearing to the court, this case is adjourned over to to-morrow morning.

19 And thereupon, afterwards, to wit, on the 26th day of said month of March, 1868, the following further order was made in said cause:

SAMUEL REEVES
v.
THE MEMPHIS & CHARLESTON RAILROAD COMPANY. } Case.

This day came the parties by their attorneys, and came also the jury empannelled in the cause; and the jury, having been instructed by the court as to the matters of law arising in the cause, on their oath say they find for the plaintiff, and assess his damages, by reason of the premises, to ten thousand nine hundred and forty-six dollars and one cent. It is, therefore, considered by the court that plaintiff recover of defendant the damages so assessed by the jury as aforesaid, and the costs of this suit; and that execution issue therefor.

20 And thereupon, afterwards, to wit, at the said March term, 1868, of said court, and upon the 15th day of April, 1868, the following order was made in said cause:

SAMUEL REEVES
vs.
THE MEMPHIS & CHARLESTON RAILROAD CONPANY. }

This day came the defendants by attorney, and moved the court for a new trial in this cause; and said motion being argued by counsel, and the court fully advised concerning the same, it is considered by the court that said motion be disallowed.

And afterwards, at the term last aforesaid, and upon the 18th day of April, 1868, the following further proceedings were had in said cause, to wit:

SAMUEL REEVES
v.
THE MEMPHIS & CHARLESTON RAILROAD COMPANY. } Case.

This day came the defendant by attorney, and tendered its bill of exceptions herein, and asked that the same be signed and sealed by the

court, and made a part of the record in this cause, which was accordingly done.

21 *Bill of exceptions.—Filed April 18th, 1868.*

Circuit court of the United States for the district of West Tennessee.—March term, 1868.

SAMUEL REEVES
vs.
MEMPHIS & CHARLESTON RAILROAD COMPANY.

On the trial of this cause before the Hon. Connally F. Trigg, judge, &c., the following proceedings were had, and the following evidence submitted to the jury:

The plaintiff introduced and read as evidence on his behalf the deposition of R. W. Price, "Exhibit No. 1" to this bill of exceptions, which is as follows:

22 No. 1.

SAMUEL REEVES
vs.
THE MEMPHIS & CHARLESTON RAILROAD COMPANY.

The deposition of R. W. Price, taken in the above cause now pending in the circuit court of the United States for the district of West Tennessee, by consent of the parties, on behalf of the pl't'ff, in the presence of counsel for both parties.

The said witness, being first duly sworn, in answer to question by plaintiff, says:

I am 24 years old; I resided in Saulsbury, N. C., in Feb'y, 1867; I know Samuel Reeves, the plaintif in this cause, and have known him all my life.

In February, 1867, I rec'd a letter from the pl't'ff directing me to ship all the tobacco in the factory at Saulsbury, N. C., to Galbreath, Stewart & Co., Memphis, Tenn.

Said original letter is here attached to my deposition, marked A, and bears date Pendleton, Ark, Feb'ry 10th, 1867.

23 "*A.*"

"PENDLETON ARK.,
"*Feb'ry 10th*, 1867.

"DEAR BOB: Ship at once by freight all the tobacco in the factory to Galbreath, Stewart & Co., Memphis, and come along with it in short stages; don't leave it at all, & bring it through with you.

"Let the freight be paid at Memphis. If this plan is changed by Dr. Pendleton, follow his instructions as to the place to ship to; but you must stay with it, and bring it through as soon as possible. Look for one hundred dollars by express to pay your travelling expenses.

"When you get the tobacco to Memphis, or to the point where Dr. Pendleton says take it, you come to me immediately at Homestead Landing, on the Arkansas River. I need you very much. I have rented a plantation with 700 acres open land, bought my mules, plows,
24 gear, wagons, &c., and will go to work to-morrow on Mrs. Smith place.

"Your friend,

"SAMU'L REEVES, JR."

The letter came to me by express with one hundred dollars, and I forthwith shipped the tobacco, 163 boxes of manufactured tobacco, in pursuance of the instructions, to Galbreath, Stewart & Co., Memphis, Tenn.

The tobacco, 163 boxes, was the property of the plaintiff in this cause. I accompanied the tobacco from point to point; that is, I shipped the tobacco by freight train, and followed always in the next passenger train until I reached Chattanooga, Tennessee. All the tobacco arrived at Chattanooga, Tenn. I saw the tobacco unloaded at Chattanooga, and checked it off as I did at every point where the tobacco was reshipped.

The tobacco arrived at Chattanooga about the 6th March. I found it there upon my arrival. I arrived there at night, & early next
25 morning called on the agent of the Memphis & Charleston railroad, and told him that I had a car and a half load of tobacco there, that I wanted shipped to Memphis, and was anxious to get it off.

The agent told me, that just as soon as the tobacco was transferred to his cars, it would leave on the first freight train. I went then to see the gentleman who transferred the freight; told him my business, and told him that I was anxious to get on. He said that if he could accommodate me that he would do so, and he did unload my tobacco that evening; about four o'clock it was put out on the platform and remained there about one hour, until some cars could be shifted upon which to reload it. It was then reloaded into two of the Memphis & Charleston railroad cars; car No. 534 contained 100 boxes; car No. 545 contained 63 boxes—the tobacco not fully loading car 545. I waited then
26 until it was filled with other freight and locked up as was 534.

After the tobacco was loaded, I went to the agent of the Memphis & Charleston railroad, and told him that my tobacco was loaded in his cars. He replied, that if the bills were brought over in half an hour that the tobacco would leave that evening at 6 o'clock, but that if the bills did not get over in half an hour, it would not get off until the day to-morrow morning. I then went back to the agent who loaded the cars, and told him that the agent of the Memphis & Charleston railroad said that if he would send the bills over in half an hour that my tobacco would get off that evening. I then went to the hotel, got my supper, and went back to the agent of the Memphis and Charleston road, and asked him if the bills had been brought in. He said they had, and my tobacco would leave at six o'clock that evening. It was then near
27 about that hour. I thanked him for his immediate attention to my freight, and returned to the hotel, settled my bill, and left Chattanooga that night some time before nine o'clock for Memphis on a passenger train. I would not have left Chattanooga that night if the agent had not told me that the tobacco would go at six o'clock, for the reason that my instructions were to remain with it the whole time, and not leave it. I had not left it behind at any other point, always remaining at the point of reshipment until after the tobacco was sent forward. I knew the quality of the tobacco. There were three different grades; there were 33 boxes of the common; I think there were from 45 to 48 of the second quality—I cannot state precisely, but I know there were less than 50 and more than 40; and about 80 or more of the best quality, enough in all to make 163 boxes. The tobacco would average
28 one hundred & four pounds to the box nett. I don't know what it was worth in Memphis, Tenn. I sold some of the common quality, 100 boxes, some time previous at Augusta, Geo., at 32 cents per pound. The second quality was worth 50 cents per pound at the factory. I suppose it would be worth more at Memphis. The best

quality was worth 80 cents per pound at the factory in Saulsbury, N. C. I suppose it would also be worth more in Memphis.

When I left Chattanooga there was no water in the streets. I was not down towards the river, in fact only about the hotel and depots of the railroads.

I saw no sign of any flood or high water.

The tobacco was all the property of the pl't'ff, Samuel Reeves.

Cross-examination:

1st quest. Are you related to the pl't'f?

Ans'r. The plaintiff is my second cousin by marriage. I am simply his agent, and have been from the 1st day of Janu'y, 1867, to this
29 day. He bought the tobacco in the leaf and manufactured it during the war, but I don't know the year. Dr. Pendleton and he are in partnership planting on the Arkansas River, but he had no interest in the tobacco at all. He came to Memphis to attend to it at the request of the pl't'f, who was in Arkansas. I don't know the name of the agent of the Memphis and Charleston railroad at Chattanooga. I found him at his office on the right of the car-shed and depot. He was a man about 5 feet 9 or 10 inches high; wore whiskers all on his face, I think. I would not swear positively that his upper lip was covered. I don't remember the color of his hair; but his whiskers were brown, I think. I think from his appearance he was thirty-five and over. I am certain he did not tell me it would leave at six o'clock next morning, but said it would leave at six o'clock that evening. No one present
30 when he told me so except a negro, who was standing by the stove in the office. I do not know that a freight train left Chattanooga that evening at all. I came on to Memphis on that trip without stopping or any delay.

Re-examination by pl't'f:

I asked a porter to direct me to the office of the Memphis & Charleston Railroad Company. He pointed it out to me. I went in and asked for the agent; a gentleman then in the office replied that he was the agent. He had a desk in the office, and was transacting business with other persons as such agent. I heard them talking about freights, &c. It was with this same person with whom I had all the different interviews and conversations as agent of the Memphis and Charleston railroad.

By def't:

I don't know the names of any of the railroad agents at Chatta-
31 nooga; nor do I know the names of any persons whom I saw or heard talking with the agent about the freights, &c. They were all strangers to me.

And further deponent sayeth not.

R. W. PRICE.

Subscribed and sworn to before me Sept. 11, 1867.

A. S. MITCHELL, *Clk.*

The undersigned, attorneys for plaintiff and defendant, agree to waive formal caption and certificate to the foregoing deposition, and agree that the same may be read in the hearing subject only to exceptions for competency and relevancy.

WRIGHT & McKISSICK, *For Pl't'ff.*
HUMES & POSTON, *Atto's for Def't.*

SEPT. 11, 1867.

He also read, without objection, Exhibit No. 2, letter of O. L. Anderson, ass't sup't for Memphis & Char'eston R. R. Co.

32 *Exhibit No. 2.*

MEMPHIS, TENN., *Ap'l* 17, 1867.

Agreement entered into this day between the Memphis & Cha's. R. R. Co., & Galbreath, Stewart & Co.

The said Galbreath, Stewart & Co. received of the M. & Cha's. R. R. Co. the following lot of tobacco in a badly damaged condition, to wit:

100 boxes tobacco.
63 boxes tobacco.

The said tob'co having been consigned to Galbreath, Stewart & Co. by Augusta, Ga., & was damaged during the great freshet at Chattanooga while in the cars of the M. & Cha's. R. R.

To prevent further loss on the tobacco it is now received by the said Galbreath, Stewart & Co., to be disposed of as soon as possible, on the best possible terms, for and on account of whom it may concern.

As witness our hand the day and date as above.

O. L. ANDERSON,
Ass't Sup't for M. & C. R. R. Co.

33 Plaintiff then proved by William B. Galbreath, of the firm of Galbreath, Stewart & Co., that, as consignees of the tobacco, on the 17 of April, 1867, finding it greatly damaged from water, to prevent further loss, they sold the whole 163 boxes of tobacco by themselves and their agents to save further sacrifice, and at the highest market price in Memphis for tobacco of that quality and in that condition, and it sold for $\$1{,}944\frac{79}{100}$.

The plaintiff further proved that the tobacco, if uninjured when it arrived in Memphis, would have been worth in this market $\$12{,}890\frac{80}{100}$ at the date of its arrival; and that the defendant, the Memphis and Charleston R'road Company is, and was in March, 1867, a common-carrier; and that the said railroad company had been regularly organized under a charter granted by the legislature of the State of Tennessee.

This was all the testimony introduced by the plaintiff.

34 The defendant introduced before the jury the following testimony:

First. The depositions of Jno. B. Whitesides, J. J. Corbin, C. Phillips, T. Fort, C. A. Stillman, Jno. P. Long, S. B. Lowe, & W. J. Pryor, J. B. Weaver, J. F. Jackson, Thos. Richardson, all found in "Exhibit No. 3" to this bill of exceptions.

Exhibit No. 3.

In the U. S. circuit court for the district of West Tennessee.

SAMUEL REEVES
vs.
THE MEMPHIS AND CHARLESTON R. R. Co.

The following depositions of John B. Whitesides, J. J. Corbin, C. Phillips, T. Fort, C. A. Stillman, Jno. P. Long, J. B. Weaver, J. F. B. Jackson, Thos. Richardson, S. B. Lowe, & W. J. Pryor were taken by consent of parties, on behalf of def'ts, at Chattanooga, Tenn., on the 8th & 9th of Aug., 1867. Formal certificate and caption waived by counsel.

JOHN B. WHITESIDES, of lawful age, deposes and says:

35 1 quest. How long have you been a resident of Chattanooga?

Ans. For 39 years this fall.

2d quest. Were you connected with the location and construction of the Nashville & Chattanooga railroad; if so, in what capacity?

Ans. Yes, sir; I was assistant engineer in its location and construction.

3d quest. How did you locate the track from the depot in Chattanooga to Lookout Point?

Ans. We put the track about three feet above high-water mark of 1847, as ascertained from my own personal knowledge and enquiry of citizens who knew.

4 quest. Why did you select the high-water mark of 1847 as your standard?

Ans. In order to put the track above any high water that had ever been known in the country. The flood of 1847 was the highest I ever knew, and from the tradition and history, as derived from the oldest citizens, it was a little higher than the flood of 1826, which was the highest ever known in this country.

36 Quest. Were you in Chattanooga in March, 1867; if so, in what business?

Ans. I was; and was clerk in the Western and Atlantic railroad.

Quest. State the circumstances of the flood in that month.

Ans. There was no apprehension that the flood would rise as high as the depot, or would rise as it did some ten feet above the depot floor. It rose so rapidly and so much against the apprehension of every one that I lost the furniture of my residence. My residence is three or four feet above the depot ground.

Quest. Did the W. & Atlantic road loose any freight here?

Ans. Yes, sir; and from the same cause.

(The plaintiff, Samuel Reeves, by his attorney, objects to the foregoing deposition, because the same is irrelevant; and, without waiving said objection and exception, proceeds to cross-examine.)

Quest. by pl't'ff. Please state how many days elapsed from the

37 time the water began to come up into the town before the railroad depots were submerged, so as to injure and damage the freight.

Ans. To the best of my recollection, four or five days.

Quest. 2. Did the rains that made the high water in March last fall at Chattanooga or vicinity, or elsewhere?

Ans. We had some pretty heavy rains here, but the rain that made the flood fell above here.

Re-examination:

Quest. After it got of the banks, how rapidly did it rise, & particularly Friday night & the night of the 8th?

Ans. On Friday night it rose two inches per hour, as well as I can recollect.

J. B. WHITESIDES.

38 JOHN J. CORBIN, next witness, deposed as follows:

Quest. Where do you reside; how long have you resided there; and in what capacity?

Ans. I reside in Chattanooga, and have been here eleven years. I have been a clerk in the office of the Memphis and Charleston Railroad Company for twelve months last past at Chattanooga.

Quest. When and from whom did this office receive the one hundred and sixty-three boxes of tobacco sued for in this case?

Ans. It was received and put into our cars the fifth day of March, 1867, from the Western & Atlantic railroad cars. I made up the way or freight bills for this tobacco, and turned the tobacco & bills over to the Nashville & Chattanooga R. R. Co. on the evening of the fifth.

Quest. Did you keep a book in which you regularly enter freight, and the time of the reception and turning over to other roads?

Ans. We do; the book in which the freight is entered, and the
39 date of its forwarding.

Quest. Does this book show any entry of these 163 boxes of tobacco? If so, make a copy of it, and attach it to your deposition.

Ans. Yes, sir; the entry is before me. It was made in my handwriting on the evening of the 5th of March, 1867, in this book, and a copy of it is hereto attached as a part of my deposition.

Quest. What is the regular rule as to the length of time requisite to send freight off after its reception?

Ans. The regular rule is, when it is received from one depot to another, it is forwarded the next morning. That is the schedule time, and is reasonable because the freight has to be transferred from one set of cars to another.

Cross-examined by pl't'ff's att'y:

Quest. 1st. How many cars would be required to transport 163 boxes of tobacco from Chattanooga to Memphis?

Ans. Two cars.

40 Q. What length of time would it require to transfer 163 boxes of tobacco from one road to the other?

Ans. It would require one day.

3d. Can you state from your own recollection the day these 163 boxes of tobacco were received by the Memphis and Charleston r'road.

Ans. Yes, sir. They were received on the 5th day of March.

Q. 4. To whom were they consigned in Memphis?

Ans. Galbreath, Stewart & Co.

And further saith not.

J. J. CORBIN.

41 *M. and C car No. 545—Memphis & Charleston railroad—List No. 3—Freight-list forwarded from Chattanooga to Memphis March 6th, 1867.*

Consignor.	Consignee.	Description of articles.	No. or w'g't.	Am't fr't.	Charges.
W. & A. R. R....	Galbreath, S., & Son.	63 boxes of tob'c.....	6, 667	66 67	63 32

M. and C. car No. 534—Memphis & Charleston railroad—List No. 2—Freight-list forwarded from Chattanooga to Memphis March 6th, 1867.

Consignor.	Consignee.	Description of articles.	No. or w'g't.	Am't fr't.	Charges.
W. & A. R. R'd..	Galbreath, S., & Son.	100 boxes tob'c..... ..	14,000	140 00	494 26

42 COLUMBUS PHILLIPS, next, deposed as follows:

Quest. How long have you resided in Chattanooga, and what is your business?

Ans. I am a merchant, and have resided and done business here three years.

Quest. State your knowledge of the flood which occurred here in March, 1867.

Ans. The water rose very rapidly after it got out of the banks. On the night of the 7th (seventh) I sat up all night and measured the water several times during the night. From 8 to 10 o'clock it rose about ten inches, rising six inches the first hour and four inches the next. It continued to rise four inches per hour until daylight. Up to the night of the 7th there was no apprehension that the water would submerge the depot & town. But after it rose six inches in an hour, we did become frightened. The water rose as rapidly after daylight on the 8th as it had previously during the night.

43 Quest. Was there any loss or destruction of merchandise or other private property in the town by the flood?

Ans. During the night of the 7th, we carried our stock up-stairs; but a great many who had one-story buildings lost their stock or had it greatly damaged. It was very dangerous to walk through the town that night because of the water.

Quest. What was the greatest hight of the water, and when did it reach the highest point?

Ans. On the 8th it rose into our building in the morning, and continued to rise until the 10th or 11th, when it reached the highest point. The highest point was 12 or 13 feet above Market street. The depot and grounds are as high as our buildings.

44 (The plaintiff, Samuel Reeves, by his attorney, objects and excepts to the foregoing deposition of Columbus Phillips, because the same irrelevant and incompetent; and, reserving the said objections and exceptions, proceeds to cross-examine.)

1. Please state whether the rains which caused the flood in Chattanooga fell in the vicinity or elsewhere.

Ans. Some of it fell here. We had heavy rains here about that time; but the flood was principally caused by the snow and rains which fell in the mountains of East Tennessee.

Q. How many days elapsed after the water came over the river banks before it reached the highest point?

Ans. About four days.

COLUMBUS PHILLIPS.

45 TOMLINSON FORT, next witness, deposed as follows:

Question. State your knowledge of the flood that occurred here in March, 1867.

Ans. I was in Chattanooga in business on Market street at the time of the freshet in Tennessee River in March last. Rains had fallen for about three weeks before March 7, 1867—both in Chattanooga and higher up the Tennessee River. The river rose gradually until the evening of Thursday, 7th March, at which time it had reached what was generally considered the high-water mark of 1846. No apprehension on was felt by any one that the water would rise higher until the night of 7th March, when the water rose from 7 o'clock p. m. to 8 o'clock p. m. 5½ in.; from 8 to 9, 6 in.; from 9 to 10, 4½ in.; & until daylight, 4½ in.—4 in. & 3½ in. each hour, or an everage of 4 in. per hour from 9 o'clock p. m.,

7th March, to 6½ o'clock a. m., 8th March. I measured the water
46 at the end of each hour, and together with Mr. Philips, whose deposition is taken, marked it down. The water rose until about 1 o'clock p. m. on Sunday, 10th March, and reached about two feet above Market street, in Chattanooga. I felt no apprehension myself; & as my office was at least three feet above Market street, I left my books & furniture in my office. I tried to remove them on Friday, and succeeded in doing so with a boat through a window. I think no merchant saved any large portion of their goods without damage. The water rose so swiftly on Friday that boats could not be moved about on the streets if any load was put in them. I came down to the Nashville & Chattanooga R. R. depot, and in the yard & railroad track, on which freight cars were standing on Friday & Saturday. On Friday, 8th, at 1 p. m., the engines standing on the tracks were submerged so as to cover their lower fire-boxes. On Saturday, 9th March, at 8 p. m., the engines and cars were submerged probably ten feet, or it may be more. In company with mayor of the city, I went on Saturday, 8th, at 8 p. m., & broke
47 open cars and took out bacon & flour, and we opened cars which had other goods. These cars were on the general delivery track, and belonged, as I supposed, to the Nashville & Chattanooga and W. & A. r. r'ds; our purpose in breaking the cars was to feed the starving population who had fled to the surrounding hills from their homes.

(The pl't'f Samuel Reeves, by his att'y, objects and excepts to the foregoing deposition of T. Fort, because the same is irrelavant and incompetent, and declines to cross-examine the witness.)

TOMLINSON FORT.

CHARLES A. STILLMAN, next witness, deposed as follows:

Question. State your pursuit and residence.

Answer. I am dispatcher of freights on the Nashville & Chattanooga r'road from Chattanooga. I have been here in that capacity since July, 1866.

Question. Do you recollect of the agents of the Memphis &
48 Charleston road turning over to you the way-bills & cars of freight, included 163 boxes of tobacco, on the 5th day of March, 1867.

Answer. I know they turned over to me, on the 5th of March, 1867, a package of way-bills and cars of freight, but whether they contained 163 boxes of tobacco I do not know.

Question. When should the train of which these cars formed a part have left?

Ans. They should have left, according to the schedule, at an early hour, about seven o'clock of the morning of the 6th.

Question. Why did not this train & other freights go out on the morning of the 6th, as they should have?

Answer. Because of rock on the track under the mountain, and then the bridge at Whitesides was washed away. The freight train came over the road at 2 o'clock that morning. One slide of rock had occurred at its coming, but the slide occurred between that & 7 o'clock that morning.

49 Question. How far is the creek, over which the bridge at Whitesides rested, from Chattanooga?

Answer. About 15 miles.

Question. When freight is delivered to you on cars by the Memphis & Charleston railroad during any day, in what time do you forward it?

Answer. The general rule is that they hand us the bill in the evening

& we send them next morning, though in some instances we have sent them the same night.

Cross-examined by pl't'f:

Question. Which happened first, the sliding of rock on the road, or the washing away or falling of the bridge at Whitesides?

Answer. I think the bridge fell first.

How far is the place from Chattanooga where the slide was?

Ans. I don't know where it was.

50 Question. Was the slide between Chattanooga and Whitesall, or beyond the latter place?

Answer. Between Chattanooga and Whiteside.

Question. Would the Memphis & Charleston freight have gone out on the morning of the sixth of March if the slide had not happened?

Answer. Yes, sir; it would have gone out on that morning if the slide had not happened and the bridge had not fallen.

Question. What caused the bridge to fall?

Answer. I expect it was high water; a freshet in the creek.

Question. At what hour did the bridge fall?

Ans. I don't recollect; some time early in the morning.

Question. How long did the slide delay the trains?

Answer. I don't know.

51 Question. Did it delay the trains at all?

Answer. I don't know.

Question. How long did the falling of the bridge delay the trains?

Answer. Over ten days, I think.

Question. Was the railroad submerged by the high water from Chattanooga to the bridge at Whitesides?

Answer. No, sir; it was not; it was submerged for six or seven miles, out to about Wauhatchie.

Question. Could the cars with the freight have passed over the road from Chattanooga to the high ground beyond Wauhatchie on the sixth, seventh, or eighth of March?

Answer. They could have gone out on the morning of the sixth to the high ground; I don't think they could have gone on the 7th or 8th.

52 Int. If the raidroad company had removed their cars out to the high ground beyond Wauhatchie, would there have been any danger to the freight from the high water that flooded Chattanooga?

Ans. No, sir.

Re-examined:

Question. Was their any ground to apprehend, or any apprehension up to the night of the 7th, that the depot & ground would be submerged?

Answer. There was none, sir; there wasn't a man in Chattanooga, I don't think, who ever thought water would get up high enough to submerge them.

Question. Were you here; and did you see that those cars were or were not submerged?

Answer. I was here; they were not entirely submerged, but sufficiently so to ruin everything in them.

And further saith not.

C. A. STILLMAN.

53 *Deposition of John P. Long.*

JOHN P. LONG, next witness, deposed as follows:

Question. Where have you resided since your birth?

Ans. I was born at Knoxville, Ten., in 1807, & moved to Reah, county Washington, in 1813; and then moved to Chattanooga in 1836.

Question. State your knowledge and reccollection of the remarkable floods which have occurred here, both from your observation and tradition & history?

Answer. From tradition, there was a remarkable freshet here in 1791, which old men differed about; the larger number thought it higher than that of 1826. My reccollection is that the first great freshet was in 1826; then we have had freshets periodically every seven years; but the highest, until this spring, were those of 1826 & 1847; those of 1826 &
54 1847 were about the same size; they were short of the freshet of 1867 by about fifteen feet.

Question. Is the track of the Nashville & Chattanooga r'road at Chattanooga above or below the freshets of 1826 & 1847?

Ans. The track is about four feet above the high-water mark of 1826 & 1847.

And further saith not.

JOHN P. LONG.

(Plaintiffs except to this deposition for incompetincy and irrelevancy.)

JOHN B. WEAVER, next witness, deposed as follows:

Question. What is your pursuit, & in whose employ?

Answer. I am agent of the Memphis & Charleston R. R. Co. at Chattanooga, & have been since 1856.

55 Question. Do you recollect the freight shown in Costin's deposition in this case, & the exhibit thereto; if so, when did you turn it over, & how, to the Nashville & Chattanooga R. R. Co.?

Answer. I do recollect this lot of tobacco; it was received on the fifth, transferred and loaded in our cars on the fifth, and the way-bills therefor delivered to the officers of the Nashville and Chattanooga r'road on the evening of the 5th of March, 1867, as was the regular custom and rule.

Question. What finally became of this tobacco?

Ans. After staying some short time I shipped to Decatur, Alabama, the first point it could be taken on our road, and from Decatur it was carried to Memphis on the cars and road of the Memphis & Charleston R. R. Co.

Question. Why have you established and do you adhere to the
56 rule of sending freight on the day after it is received?

Answer. We are receiving freight during the whole day, transferring the freight from other cars & depots to ours, and making up our way-bills, and this requires most usually the whole day; & then the trains can't run irregularly, but must and do run upon schedule, & the schedule for the Memphis & Charleston r'road is every morning.

Quest. Did any one on the 5th & 6th anticipate the probable extent of the freshet as it actually afterwards occurred, or apprehend any danger to the freight in the cars at the depots of Chattanooga?

Ans. They did not.

Question. After the freshet became so great as to threaten the cars, was it possible to remove them to a place of safety?

57 Answer. It was not; as an evidence of it none of the freights of any of the roads were saved. The flood so came as to cut off the roads as they approached Chattanooga.

Question. How did you transmit this tobacco to Decatur, and was it done promptly or tardily?

Answer. I chartered the steamer Mary Byrd for the road, and sent this tobacco, as soon as I could get communication by telegraph or otherwise, and without delay I forwarded it as aforesaid.

Cross-examined by plaintiff's attorney:

Quest. 1. Was this tobacco in good order when received by you?

Answer. Yes, sir; I think it was.

2. Was it in good order when you shipped it by the Mary Byrd?

Ans. It had been submerged; I should say it was not.

58 3d. Was it not very badly damaged by the submersion?

Ans. Yes, sir, I think it was; I did not examine it, but I should say it was.

4. Please explain the mode of doing business at Chattanooga between the Nashville & Chattanooga R. R. Co. and the Memphis & Charleston R. R. Co.

Ans. The present eastern terminus of the Memphis & Charleston R. R. is at Stevenson, Ala.; by an arrangement between the two companys made in 1858, the Memphis & Charleston R. R. Company have the right to run their freight & passenger cars over the Chattanooga road from Stephenson to Chattanooga, the cars being hauled by locomotives belonging to the Nashville & C. R. R. The Memphis & Charleston R. R. have an office & depot at Chattanooga, and their agent (myself) receives the freight destined for the M. & C. r'road, loads it in cars belonging

59 to the M. & C. R. R.; these cars, when loaded, are turned over, with the way-bills, to the agent of the Nashville and Chattanooga R. R., who receives them & sends them on to Stephenson, where they are transferred on to the M. &. C., and forwarded to their destination.

Quest. Could not the freight turned over by you to the N. & C. R. R., on the evening of the 5th of March, 1867, have been sent to a place of safety somewhere on the road before it was submerged?

Ans. If we had foreseen the flood, or anticipated its height, the tobacco & other freight could have been sent to a place of safety after it was turned over. We could have sent it to Atlanta or Knoxville; possibly it might have been sent out to Whiteside; but I am not certain whether the cars could have passed the slide spoken of by Stillman in his deposition.

And further deponent saith not.

J. B. WEAVER.

60 J. F. JACKSON, next witness, deposes as follows:

Quest. Where do you reside, and what is your profession or pursuit?

Answer. I reside in Chattanooga, & am the agent of the W. & Atlantic R. R. Co, & was such at the time of the late freshet.

Quest. How much higher or lower is the location of the track of the several railroads at Chattanooga above the previous high-water mark?

Ans. It was understood that our track was built two & a half feet above the highest high-water mark of any previous date. The water of the recent freshet was seven to eight feet above or over our track.

Quest. Are the grounds on which the depots stand higher or lower than the tracks further out?

Ans. They are higher, all of them.

Quest. What was the first point on your road covered, & how did the water come?

61 Answer. The first point was ten or twelve miles, & then the water gradually came from the south towards Chattanooga until it covered the entire road, except at two points. The entire track for six or seven miles was submerged.

Question. After it became probable that the cars would be submerged, was it possible to remove the freights from the cars to a place of safety?

Answer. I don't think it was. The first apprehension was on the evening of the 7th that the flood would damage the cars or freight.

Question. Why could not you move the cars?

Answer. The water was so deep that it put out the fires of the engines.

Cross-examined by pl't'f:

62 1st. Please state, as near as you can, how many days elapsed from the time the water commenced coming up over the river banks into the town, before it got so high the fires were put out in the locomotive fire-boxes.

Answer. I think it commenced coming out on the morning of the sixth, and we could run the engines until the evening of the 7th. This refers to the condition of the water in and near Chattanooga. Out on our road ten miles from Chattanooga, the road was impassible on the morning of the sixth; several trains which we sent out on that morning had to return.

2. Please whether you made any efforts to save any of your freights, when you did so, and whether you were successful, and how did you accomplish it.

Answer. On the evening of the 7th, I thought the yard would be submerged; the water was just coming over our track. It was then
63 about one foot deep on the Nasville & C. track. I made an effort to save our freights on that evening, and pulled out one train of 37 cars. I pulled this train out on a piece of the track of the East Ten. road that had not been submerged. There was about 1,000 yards of that track out about ¾ of a mile from the depot, which was above overflow. In coming back to the depot, the track had given way and the water was so deep that the fires were put out in the fire-boxes, consequently we could not get out any more cars or freights.

Re-examined:

Question. Could the Nashville and Chattanooga Railroad Co. have pulled a train out at the time you did on the Ga. & Ten. road?

Answer. I don't think they could, the track being on lower ground. And further saith not.

J. F. B. JACKSON.

64 THOMAS RICHARDSON, next witness, deposed as follows:

Question. Do you reside in Chattanooga, and, if so, how long?

Ans. Yes, sir; since 11 or 12 years.

Quest. State the effect of the late freshet on your business houses & place.

Answer. About a mile and a half from Chattanooga, near the base of Lookout Mountain & in the same direction that the Nashville & Chattanooga R. R. track runs, I have a large tannery and the necessary buildings and improvements. This tannery is on ground which is said to be above high-water mark of the freshet of 1847, but a little lower than the depot grounds & track of the Nashville & Chattanooga R. R. The water of the recent freshet was between eleven & twelve feet above the ground floor of my buildings, and it was between 14 & 15 feet above

65 any previous freshet that I had ever known. The water rose so as to submerge all the railroad tracks, floating off empty cars, and submerging loaded ones, except those very near the depot, where the ground was higher and the water did not quite reach the top of the cars.

Question. And did you protect the tannery property from the flood; if not, why?

Ans. I did not, because I could not, although I made every effort to save it. I first threw up levys, thinking it would not rise above the freshet of 1847. One evening I left the tannery all safe, as I supposed, above the water; but during the night the water rose six or seven feet, making a perfect sea between Chattanooga & the tannery, and I had to go down in a boat and found the water six feet above the ground
66 at the tannery. At ten o'clock I suffered greatly and heavily in bark and hides and leather, which as to the hides and leather I might have prevented had any one anticipated the height of the flood. The flood carried away all the buildings except the main building, including the barn, blacksmith shop, & others.

Question. The evening before this sudden & great rise, how did the height of the freshet compare with that of 1847, and was any further rise apprehended?

Answer. The evening before the sudden & great rise, I think the water was as high as the highest freshet I had ever personally seen—I mean the rise of 1859. When I left the tannery in the evening, the water was rising four inches an hour, and we thought it might reach probably the rise of 1847; but no one apprehended that it would go higher.

Quest. Was there any other private property lost by other
67 persons by the suddenness & extent of this rise of the night you speak of.

Ans. I know every one was very much surprised by that rise; but as to losses I could only tell from hearsay, having myself been constantly watching my own affiairs at that time.

(The pl'tf, by his att'y, excepts and objects to the foregoing deposition for competency and relevancy; and, without waiving said exceptions and objections, proceeds to cross-examine.)

Question. Please state whether the flood which you speak of came suddenly or gradually over the city of Chattanooga and vicinity. How many days elapsed from the time the water came over the river banks until it reached the highest stage?

Answer. As well as I recollect, it had been rising gradually for several days, until it got to the point of 1859; after that it rose very rapidly.

And further saith not.

THOS. RICHARDSON.

68 S. B. LOVE, next witness, deposed as follows:

Question. What is your pursuit, and where do you reside?

Answer. I reside in Chattanooga, & am manufacturing iron.

Question. Where are your buildings and machinary situated?

Answer. About 1½ miles from the passenger shed in Chattanooga, near the track of the Nashville & Chattanooga r'road, in the direction of the Lookout Mountain.

Question. Upon what elevation of ground did you have your buildings erected?

Answer. From all the information I was able to gather from parties

who lived here about thirty years, and from all other information that I could get, I considered that I had put my mill some three or four
69 feet above the highest water mark that had ever been known here, excepting a rumour that I heard of a high water that occurred in 1780, which would have about covered the ground upon which the mill stood. The floor of the mill is about level with the track of the N. & C. R. R. opposite the mill.

Question. State your knowledge and observation of the recent freshet here.

Ans. On Thursday (date not recollected) the water had risen nearly to the floor of the mill, at which point I thought it would go but little beyond; that day or that night a very heavy and continuous rain occurred. I anticipated a further rise of not to exceed two feet in consequence of that rain, and acted accordingly to this calculation in removing lumber, bellows, patterns, & other property up to a point 3 feet higher, & worked until eleven o'clock at night, & went to bed in
70 the upper room of my office satisfied I had saved the property so elevated. When I rose next morning, a little after daylight, the water had risen on my office floor, which is about level with the mill—between five & six feet; everything I had endeavored to save the evening previous was submerged or had floated off. The river continued to rise until about the next Tuesday, and reached fourteen feet two inches in the mill. The last two or three days the rise was quite gradual.

Question. Were you or not supplied with boats & hands to try to save your property?

Answer. I had two small scowls & two cenoes, and some fourteen of my men with me who had been driven out of their houses.

Question. With this assistance did you lose any property; if so, of what value?

Answer. My loss was about $11,500^{00}_{00}$.

71 (The plaintiff, by his att'y, objects and excepts to the foregoing deposition for competency and relevancy; and, without waiving said exceptions and objections, proceeds to cross-examine.)

Question. Please state, as near as you can, how many days the water had been rising in the Tennessee River before the Thursday of which you speak.

Ans. I don't know that I recollect, but perhaps one, two, or three weeks.

Q. Please state whether there are towns or cities on the Tennessee River above Chattanooga having railroad communication with Chattanooga; whether newspapers are published in any of those towns & cities; and whether the trains were passing between Chattanooga and those towns and cities which you will please name, at the time the water
72 was rising at Chattanooga which occasioned this great flood.

Answer. There are towns and cities on the Tennessee River above Chattanooga, having railroad communications with Chattanooga. The first town on the Tennessee River with railroad communication is Loudon, 70 miles where the railroad crosses the river; the next is Knoxville, 110 miles. After leaving Knoxville, the railroad again crosses the Tennesse River at Strawberry Plains, 124 from Chattanooga & 14 above Knoxville. Newspapers were published at Knoxville at the time of the flood. As near as I can recollect the trains ran regularly on the road between Chattanooga and Knoxville up to the Thursday of which I have before spoken. I think they were stopped by the high water between Chattanooga & Knoxville on that day.

Re-examination:

Quest. Are you certain that the trains were stopped on that day or on the next?

73 Ans. I think it was on the day previous to that sudden rise. & further saith not.

S. B. LOVE.

WM. J. PRYOR, next witness, deposed as follows:

Question. Where do you reside, how long have you lived at your present home, & in what capacity?

Ans. I live at Chattanooga, and have lived here since December, 1865; and since July, 1866, as agent of the Nashville & Chattanooga R. R. Co.

Quest. What have been your duties as agent of said road?

Answer. The management of trains and the shipping of freights & passenger.

Question. Did the agents of the Memphis & Charleston R. R. Co., on the evening of the 5th of March, 1867, deliver to you as agent of

74 the Nashville & Chattanooga R. R. Co. several cars laden with freight, and among others 163 boxes of tobacco?

Answer. I do not know as I do not make up the trains, nor do we know what are in the cars.

Question. Cars laden with freights, delivered by the agent of the Memphis & Charleston R. R. Co. to the agent of the Nashville & Chattanooga R. R. Co. on the evening of the 5th of March, 1867, should have gone out when?

Ans. They should have gone out on the morning of the 6th of March, 1867, because, by the rule & schedule of the road, a train goes out every morning for the express purpose of carrying such freight cars.

Question. Did the usual freight train leave on schedule time on the morning of the 6th of March, 1867?

Answer. It did. We started out on regular freight trains on

75 its regular schedule. After proceeding some distance, it was discovered that the road was obstructed by rocks that had fallen in on the track since two o'clock that night. The trains had to return to Chattanooga until the track could be cleared. During the time we were clearing the track we received a dispatch by telegraph that one hundred feet of the bridge over Running Water Creek had been washed away by the flood. The trains were thus compelled to remain at Chattanooga until that span of the bridge could be repaired, for Col. Yates & I supposed that was & would be the only difficulty, and he went there immediately and proceeded to repairing it; & while thus engaged, the water rose and covered the road track this side of him, until he was cut off.

The trains, including the Memphis & Charleston cars, remained

76 at the depot awaiting these repairs. The Memphis cars were placed on as high ground around the depot as we had.

Question. When did the water rise so as to submerge this train?

Answer. On the night of the 7th we moved all the N. & C. cars from the lower part of the tracks up to the highest ground on one track. The water continued rising rapidly during the night of the 7th, until on the morning or certainly by noon of the 8th the engines could not move at all, because of the depth of water on the track. On the evening and night of the eighth, the water rose to the hight of six or seven feet over the track, & submerged the cars.

Question. How many hours after the trains were stopped by the rock-slide before you received the telegram as to the washing away of the bridge over Running Water Creek?

77 Answer. I do not recollect; but if the slide had not been in the way the bridge washed away so early that we could not have crossed it, but would have had to return.

Question. Up to the night of the 7th did you suppose the cars were safe, or did you apprehend danger to them?

Ans. We had no idea, sir, that the cars or freight in our yard were in the least danger, for the water never had risen above the track, and we were informed the track was above high-water mark of the highest freshet ever before known.

Question. How and from what direction did the water rise up to the time of the sudden & great rise on the night of the 7th or 8th?

Ans. The rise was gradual and from the direction of Lookout Mountain, by backing.

Question. From and after the commencement of the sudden &
78 great rise, from what direction did the rise come?

Answer. Suddenly the water came rushing from the direction of the Western Atlantic r'road, a direction opposite to that from which it has been coming; and then the rise continued very rapid during the night, and submerged the town of Chattanooga.

Question. Could your cars, and those of the Memphis & Charleston road, have been placed on any higher ground on your track?

Answer. They could not.

Question. Was it possible, after the danger of submerging began to be feared, to have moved those cars to any higher ground on the Western & Atlantic road, or the E. T. & Ga. r'road?

Ans. There was no higher ground on the Western & Atlantic road, and we could not get permission to [to] occupy the high ground on
79 the E. T. & Ga. road. The reason we could not get permission was that Mr. Ragsdale, the agent of the E. T. &. Ga. road, was apprehensive about a bridge some six miles out on his road, and he wished to keep his road open to work on and protect that bridge.

Question. Did you make every possible effort to save the freight from being submerged?

Ans. On the night of the 7th, about midnight, we moved the loaded cars from the lowest ground to the highest ground we had.

Question. Did you apprehend at that time that the water would rise so high as to submerge the cars you placed on the highest ground you had?

Answer. We did not; at that time, I think, it was about noon
80 of the 8th that the water rose so high that I apprehended it would submerge them on our highest ground.

Question. In the morning or at noon of the 8th, could you have moved the cars from your grounds to the high grounds of the E. T. & Ga. R. R.?

Answer. We could not, because the water was so deep on the track it would have put out the fire on the fire-boxes of the engines, and we could not have moved them because they would not permit us.

Crox-examined by plaintiff:

Question. How long were the trains delayed on the morning of the 6th by reason of the land-slide?

Answer. The freight train went out about 6 or ½ past a. m.; this train was compelled to come back on account of the slide at about 11 a. m. The same day, the 6, we sent out an engine and one or two cars
81 to Whiteside to aid in saving or repairing the Running Water bridge.

Q. Was the track from Chattanooga to Whiteside passable, & could trains have run over it during the days of 6th & 7th?

Answer. No, they could not.

Question 3. Why not?

Answer. By reason of land-slides on the road.

4th. On what day and at what hour [hour] of the day did the last train pass from Chattanooga to Whitesides during the time of the high water?

Answer. The last train came in from Whiteside and arrived at Chattanooga about 12 o'clock, midnight of the 6th. This train left Whiteside at 5 p. m.; and, in the language of the engine driver, we had to
82 dig our way in on account of the obstructions.

5th. Is there any high ground—that is, land above overflow—between Chattanooga and Whiteside on the R. R. track? If so, how far is it from Chattanooga, and how much of it is there?

Answer. Yes, sir; lots of it. The track out to Wauhatchie, 6 miles from Chattanooga, was overflowed beyond that; and between Wauhatchie and Whiteside the road crosses Raccoon Mountain, passing through a tunnel; this is above overflow for some distance, but how far I cannot say.

Question. Could the cars and freight belonging to the railroad have been moved out to this high ground during the day of the 6th of March?

Ans. No, sir, they could not.

Question. Why not?

83 Ans. For the reason that there was known to be one train, and the locomotive and part of another train, between Whiteside and Chattanooga, and we could not have sent out another train during the day unless those trains had come in, which they did not do until about 12 o'clock at night.

8. Are there any sidings or switch-tracks between Wauhatchie and Whiteside on that part of the track above overflow? If so, how many?

Answer. The company owns one at Hooker. Mr. Pratt, who owns a coal mine, has a coal track.

9. How many days or weeks elapsed from the time the Tennessee River commenced rising at Chattanooga until it reached the highest stage about the 10th or 11th of March?

84 Ans. I don't know; I didn't see the river until the 6th; it was then getting out of its banks.

10. Was there any railroad communication, and daily trains running between Chattanooga and Knoxville, and other places over the river above Chattanooga, at the time of this flood?

Answer. There is railroad communication between the places named; but I do not know when the trains stopped running in consequence of the flood.

And further saith not. W. I. PRYOR.

It is agreed that the jurats, captions, & certificates, & other formalities, are waived to the foregoing depositions, and also to the competency of those witnesses who are agents of Memphis & Charleston & the Nashville & Chattanooga roads, because of their being agents; but all questions of the competency and relevancy of the testimony are reserved.

HUMES & POSTON, *Att'y for Def't.*
WRIGHT & McKISSICK, *Att'y for Pl'tf.*

AUGUST 9*th*, 1867.

Filed by consent in open court Sept. 4, 1867; all formal objections waived.

HUMES & POSTON, *Att'ys for Def'ts.*
WRIGHT & McKISSICK, *for Pl'ff's.*

85 Second. The depositions of Thomas J. Delong and Story Wilkinson, contained in—

Exhibit No. 4.

In the U. S. circuit court for the district of West Tennessee.

SAMUEL REEVES
vs.
THE MEM. & CH'S. R. R. CO.

Interrogatories to be propounded to Thomas J. Dulong, Story Wilkirson, & I. B. Yates, at Chattanooga, Tennessee, by consent of parties in above cause, on behalf of defendant, and to be used by defendant on trial of said cause as if taken in strict and minute compliance with the laws in the United States.

THOMAS J. DULONG, witness for defendants:

1. First interrogatory by :
Your name, age, residence, & occupation from March 1, 1867, to date?

2. Second interrogatory by same:
Where were you during the recent freshet in Tennessee River in March last?

3. Third interrogatory by same:

86 State all you may know about any interruption in movements of trains on Nashville & Chattanooga railroad during the freshets, what caused the interruptions, and what efforts were made by you or others to reopen the road?

Cross-interrogatories to Thomas J. Dulong by plaintiff.

1. State whether any and what efforts were made to save freight and property in the possession of the N. & C. R. R. Co. during the freshet.

2. State whether or not the freight in possession of the M. & C. and N. & C. R. R. Co.s, could have been saved after the 5th of March, by running it out of Chattanooga, in the direction of Whitesides or Knoxville or Atlanta; and if you say that it could not have been saved, state the reasons why.

WRIGHT & McKISSICK,
Att'ys for Pl'ff.

87 In U. S. circuit court for dist. West Tennessee.

SAMUEL REEVES
vs.
MEMPHIS & CHARLESTON R. R. CO.

Deposition of T. J. Dulong, witness for defendant in above cause, taken upon interrogatories hereto appended, on the 19th September, 1867, at Chattanooga, Hamilton Co., Tennessee.

The said witness—aged 32 years; residence, Nashville, Tenn.—being duly sworn, deposes as follows:

To first direct interrogatory he answers:

Ans. Thomas J. Delong; 32 years of age; Nashville, Tennessee; from March, 1867, up to date, April 20th, 1867, conductor on freight train on N. & C. R. R., and from April 20th to date, brakeman on passenger train N. & C. R. R.

To 2nd interrogatory he answers:

At Chattanooga, Tenn.; conductor on freight train N. & C. R. R. I was conductor of freight train No. 6, N. & C. R. R., and my train consisted of an engine No. 24, N. & C. R. R., and cars of Memphis &
88 Charleston Co., loaded with freights of Memphis & Charleston Co., and destined for Stephenson station, N. & C. R. R., in the State of Alabama. My train left Chattanooga for Stephenson, on the regular schedule time for freights for N. & C. R. R., at about 5 o'clock 15 minutes a. m., March 6th, 1867. I went with my train as far as the water tank at foot of Lookout Mountain, near the track of the N. & C. R. R., about 3 miles from Chattanooga. I was informed by the watchman at the tank that obstructions were on the track. I took the hands on the train, and began to remove the obstructions. I found a stone on the track, but too large to be removed by my force. I had previous to that time sent a watchman ahead, who came back and reported that the track was covered with water, sand, dirt, and rocks at different places about three miles further, and it would require 5 or 6 hours and more hands than I had to remove the same. It was about 5.15
89 a. m. when I left Chattanooga, and I reached the tank in a few minutes. I was about 15 minutes trying to remove the stone, and lost no time, and reversed my engine and came back to Chattanooga and reported the condition of the road to the section-master at Chattanooga, whose business it is to repair the track. The section-master lost no time, but proceeded at once with tools and hands in the direction of the obstructions.

I also notified I. B. Yates, assistant superintendent of the N. & C. R. R., who was at Chattanooga, also C. A. Stillman, yard-master N. & C. R. R., of my return and the cause of it. I then backed my train on the usual side track in the depot yard N. & C. R. R. About 11 o'clock a. m., by order of Col. Yates, I took the engine of my train and the construction car. The construction car was filled with spades, picks, rope, tools, &c., besides 20 hands, necessary to remove obstructions.
90 W. J. Pryor, agent at Chattanooga; J. B. Yates, assistant superintendent; J. M. Maloney, master mechanic, at Chattanooga, besides the usual hands necessary to run a train, all employees and officers N. & C. R. R., went on this train down the railroad towards Nashville from Chattanooga, until they reached the first obstruction near the tank at Lookout Mountain. The party worked with rapidity and energy about 5 or 6 hours, when they succeeded in removing the obstructions on the road as far as Whiteside station, a distance of about 20 miles from Chattanooga. When we reached Whiteside, we met another construction repair train, under Rollins, general supervisor N. & C. R. R. The hands on this 2d train had been working through the mountains removing obstructions from the track the other side of Whiteside station. We went forward to Running Water bridge, about one mile from Whiteside station, and found two or three spans of this
91 bridge had been washed away by the flood. We came back to Chattanooga as soon as we discovered the bridge was carried away.

To the 1st cross-interrogatory he answers:

Answer. There were no two-story houses fit to store freight near the

track of the C. & N. R. R., but the cars were moved to the highest point on the track of the C. & N. R. R. in the city of Chattanooga.

To the 2d interrogatory he answers:

Ans. The freight could not have been saved after the 5th March, 1867, by running towards Whitesides or Atlanta, because the W. & A. and N. & C. R. R.s were both obstructed at that time by the freshet.

I believe that there was a part of the Knoxville R. R. that was above high water and near Chattanooga, but does not know whether after March 5th the freight could have been transferred on that road; the reason why it became impossible was the water rose so high the fires were put out the engines.

THOMAS J. DELONG.

Sworn to & subscribed before me Sept. 19, 1867.

E. NEWBY, *J. P.*

92 The foregoing deposition was taken before me, as stated in the caption, and reduced to writing by me, and I certify that I am not interested in the cause, nor of kin nor counsel to either of the parties, and that I attached the same to the interrogatories, and the same were delivered by me unaltered to Tomlinson Fort to be mailed.

Given under my hand the 19th Sept., 1867.

E. NEWBY, *J. P.*

93 STORY WILKINSON, a witness for def't:

1. First interrogatory:

Your name, age, occupation, & residence March 1, 1867, and since that date?

2. Second interrogatory by same:

State fully whether telegraphic communication was interrupted between Nashville & Chattanooga during the recent freshet in Tennessee River in March last; what caused the interruption; where the wires are placed.

3. Interrogatory by same:

State fully any efforts made by you and others to repair the lines, &c., &c., and reopen communication with Nashville from Chattanooga.

Cross examination of Wilkinson waived.

WRIGHT & McKISSICK,
Att'ys for Pl'ff.

94 In U. S. circuit court for dist. West Tennessee.

SAMUEL REEVES
v.
MEMPHIS & CHARLESTON R. R. Co.

Deposition of Story Wilkerson, witness for defendant in above case, taken upon interrogatories, hereto appended on the 19th day of September, 1867, at Chattanooga, Hamilton Co., Tenn.

Said witness, aged 23 years, being duly sworn, deposes as follows:

To first direct interrogatory he answers:

Answer. Story Wilkinson; age, 23; occupation, telegraph repairer from about March, 1867, to present date.

To second direct interrogatory he answers:

That telegraph communication was interrupted between Nashville & Chattanooga about the 6th March, 1867. The wires are placed on tele-

graph poles near the line of the Nashville and Chattanooga railroad; an interruption was caused by the poles being washed down by the freshet.

To the 3d interrogatory he answers:

On or about the 6th of March, as soon as I received notice of interruption of communication, I went with Mr. Prior, agent of N. & C. R.
95 R., Mr. Stillman, an employee of N. & C. R. R., and ——, an employee of the Southern Express Company, and perhaps on a special train on the N. & C. R. R. in the direction of Nashville. We had a flat car loaded with a boat, and we proceeded about three and a half miles from Chattanooga. We found three poles washed down, and water over; the line lying upon the ground, lacking a foot or two of being over the track. I fixed the wire on the cross-ties, and we returned to Chattanooga in about an hour. Communication was interrupted again in a very short time. Mr. Fowler endeavored again to go down the track with myself (Mr. Fowler was then telegraph operator and manager of Chattanooga office), but we found that the water had risen so as to cover the track of the railroad, and had washed about twenty-five poles, lines, and all away, and it was impossible to repair the lines until the waters subsided. As soon as the waters had subsided, we worked in repairing the damage and
96 in re-opening communication as rapidly as possible until the same was completed.

STORY WILKINSON.

Sworn to and subscribed before me Sept. 9, 1867.

E. NEWBY, *J. P.*

The foregoing deposition was taken before me, as stated in the caption, and reduced to writing by me; and I certify that I am not interrested in the cause, nor of kin or counsel to either of the parties, and that attached the same to the interrogatories, and the same were delivered by me to Tomlinson Fort to be mailed.

Given under my hand the 19th day of September, 1867.

E. NEWBY, *J. P.*

3rd. The deposition of J. B. Yates, contained in Exhibit No. 5.

97 *Exhibit No. 5.*

In U. S. circuit court for dist. West Tennessee.

SAM'L REEVES
v.
MEMPHIS & CHARLESTON R. R. Co.

Interrogatories to be propounded to J. B. Yates, at Tennessee, by consent of parties in above cause, on behalf of defendant, & to be used by defendant on trial of said cause, as if taken in strict compliance with the laws of the United States.

J. B. YATES, witness for defendants:

1. First interrogatory:

Your name, age, occupation during recent freshet in Tennessee River in March last?

2. Second interrogatory by same:

State fully what you can remember, giving events, with dates, in reference to any interruption of travel or trains on Nashville & Chattanooga Railroad Company, between Chattanooga & Nashville, during said freshet.

3. Third interrogatory by same:

98 State freely whether any effort was made by you or others to reopen communication between Nashville and Chattanooga at any time during said freshet, and what was done.

4. Fourth interrogatory by same:

What is the extent of your experience as an engineer building & managing railroads, and the extent of your acquaintance with the various lines railroads in this State or elsewhere?

5. Fifth interrogatory by same:

From that skill, experience, and acquaintance, how does the location and construction of the Nashville and Chattanooga Railroad compare with that of other railroads which which you are acquainted, & answer fully, and especially in reference to location of the railroad from Chattanooga to and beyond Running Water bridge to Bridgeport, Ala.?

HUMES & POSTON,
Att'ys for Defendants.

99 Cross-interrogatories to J. P. Yates.

1. By plaintiff:

If you have not in your examination-in-chief, please now state how much of the N. & C. R. R. track below Chattanooga and Running Water bridge, at or near Whitesides, was above overflow during the said freshet; how many switch-tracks or sidings on that part above overflow; & the length of each.

2. By same:

State whether or not the r'road company could or could not have run their freights out on the track above overflow, on the 5, 6, 7, & 8 of March. If you say that they could not, please give the reason in detail, & state whether those reasons apply to each of the days named; and, if not, to which.

3. By same:

State whether or not the said N. & C., or M. & C. R. R Co.s could have saved their freights by running them out of Chattanooga in the direction of Knoxville or Atlanta, on each of the days named, or either of them, & which.

100 4. By same:

If the plaintiff's tobacco was delivered to the defendants on the 5th of March, 1867, could human energy have saved it from destruction or damage by the freshet after that time? If you say that it could not have been saved, state why.

WRIGHT & McKISSICK,
Att'ys for Plaintiff.

In the U. S. circuit court for district of West Tennessee.

SAMU'L REEVES
v.
MEMPHIS & CHARLESTON R. R. CO.

Deposition of J. B. Yates, a witness for defendants in said cause, taken upon the annexed interrogatories, by consent of parties, by me, at Nashville term, this Sept. 23, 1867, after being duly sworn.

(1.) To the first direct interrogatory the witness says:

J. B. Yates; age, 34; assist. sup't N. & C. R. R.

(2.) To the second direct interrogatory the witness says:

101 Was in Chattanooga, March 6, 1867. The 5.45 freight train on

N. & C. r'r'd returned from a point 2½ miles north of Chattanooga, and cond'r reported some large rocks on the track, which he was unable to move. A few moments afterwards received a dispatch that 96 feet of Running Water bridge had been washed away. I afterwards ascertained, as shown in answer to 3rd interrogatory, that Running Water bridge had washed away.

3. To the third interrogatory witness answers:

That upon the report of the conductor of freight train No. 6, and receipt of dispatch, I telegraphed to Nashville for men & material to be sent forward as soon as possible, and also started with as heavy a force as I could raise in Chattanooga. Received the news of loss of bridge, as near as I can remember, at 8 o'clock a. m. Left Chat-
102 tanooga between 9 & 10 o'clock, best of my recollection. Delayed in getting men & material. We were delayed by bad track and obstructions, and also being a wild train. Upon arrival at Wauhatchie found a freight train at that station, which had been off the track in a cut. Conductor reported the track nearly half full of water, and that he had been delayed on this account. Upon my arrival at the cut found a force of men at work. Passed the place in about 30 minutes; took part of the men with me. Upon arrival at Whitesides found 5 spans Running Water bridge gone, and stream swollen so much that it was impossible to effect a crossing, though we worked laboriously nearly all the night. It was impossible to repair Whiteside bridge that night, as there could be no material suitable procured, and neither could a bridge for teams, for transfer be thrown across, on account
103 of the swollen state of the stream. March 7, 1867, the 2 road-masters and bridgemen arrived with men collected (and 14 carloads of timber) between Whitesides and Nashville, and the work was commenced with vigor. About noon received a dispatch from Chattanooga, that Chattanooga and Lookout bridges would wash away unless cars were put on them. Cars and old engines were placed on these bridges, and remained there until the water fell again below the track. Running Water bridge was completed, as near as I can recollect, Saturday, March 23rd. It was over 100 feet high, and the weather was bad, so that it could not be pushed forward as rapidly as it could have been done if the weather had been good.

Also, we were cut off from Nashville and Chattanooga by the
104 freshet over the road, and the washing away of the Bridgeport bridge, and 5 bridges on Crow Creek. When the water fell the force was divided, so that all structures and the track (with the exception of the Twin River bridge at Bridgeport) should be completed nearly in the same time; for this reason, also, Running Water bridge took longer time to finish, as it would have been of no service to finish that bridge sooner with other bridges down. Communication was open, by transferring at Bridgeport with steamboats, on Sunday, March 24th, 1867. We spared neither money, energy, or labor to repair the damage done by the flood to the road. Although we had the advantage of men and materials, I know that human agency could not, under the circumstances, have repaired the damage sooner. I have conversed with
105 other railroad men outside of the N. & C. corporation, and all admit that the co. repaired damage with remarkable dispatch.

4. To the fourth direct interrogatory witness says:

I have been connected with railroads since August, 1852. Was employed as civil engineer on the New York Central, & Detroit and Milwaukie, and other railroads until commencement of the war. During the war belonged to an engineer reg't, and followed my profession of c.

engineer and assist. sup't nearly the whole time. I have traveled over a great many roads in the States. Know the roads mentioned above; the M. & Charleston, N. & Decatur, Louisville & Nashville, N. & N. W. r'r'd, and many others.

5. To the fifth direct interrogatory witness says:

The location cannot be bettered much. It was located, I under-
106 stand, by one of the best engineers in the country, J. Edgar Thompson, and it was built above the highest point of high water known to any person. The location & construction of the road from Wauhatchie to Chattanooga could not be bettered, in my opinion, any way. If track is raised to a point above last high water, it will throw it 10 feet above its present bed in Chattanooga, which is altogether, in my opinion, impracticable.

The falling of rocks on the track cannot be prevented unless the whole face of Lookout Mountain is cleared of loose rocks, and then it would be impossible to tell which to move or which to leave, as other pieces might be detached by so doing.

I have never known rock on the track at the base of the mountain before.

(1.) To the first cross-interrogatory witness says:

107 There was 8 miles of track out of water between Chattanooga and Running Water bridge; over three side-tracks above and 3,800 feet of side-track, all of it north of Wauhatchie.

2d. To second cross-interrogatory witness says:

It could from the 5th to March 6th, until 5.45 a. m., and not afterwards. The first regular train out of Chattanooga was at 5.45 a. m., and this was not able to proceed on account of the rocks on the track & the loss of the bridge at a later hour. I sent the train that took me to Whitesides back, at about dusk, to Chattanooga, and had fears that would not be able to reach there on account of the washing in of the cuts and rise of the water. It was the last train possible to be sent over the road from Chattanooga, because cars had to be placed on bridges between Wauhatchie & Chattanooga to keep them from floating off.

108 3. To the third cross-interrogatory witness says:

I was not in Chattanooga at the time. The 5th or the 6th of March they might have been taken out; but at that time no reasonable man could have immagined that it was or could, under any circumstances, be necessary.

I was not in Chattanooga on the 7th or 8th of March, and cannot answer.

4th. To fourth cross-interrogatory witness says:

Freight for M. & C. r'road was received during the day at Chattanooga, and was shipped the next morning on train No. 6, at 5.45 a. m.; and that by the regular time card of freight N. & C. r'r'd, this train took M. & C. freight. I cannot see how any human forethought or energy could have saved the freight, although I was not in Chattanooga on the 7th or 8th. I consider this a parralel case with N. & C. freight,
109 as our agent would most assuredly have saved it if human forethought and energy could have done it.

J. B. YATES.

Sworn to and subscribed before me this Sept. 23, 1867.

T. D. CANETY,

J. P. for Davidson County, Tennessee.

The foregoing depositions were taken before me, as stated in the caption, and reduced to writing by the witness, and acknowledged in my presence; and I certify that I am not interested in the cause, nor of kin nor counsel to either of the parties, and that I sealed them up and delivered them to Tomlinson Fort without being out of my possession or altered after they were taken.

Given under my hand the 23d day of September, 1867.

T. D. CANETY,
J. P. for Davidson Co., Tenn.

Bill of cost:

Taking depositions..... $1 00

Rec'd pay by Fort.

T. D. CANETY, *J. P.*

110 Fourth. The depositions of M. S. Byers and J. F. Martin, contained in—

Exhibit No. 6.

In the circuit court of the United States for the district of West Tennessee.

SAM'L REEVES
vs.
M. & C. R. R. Co.

Deposition of M. S. Byers & J. F. Martin, witnesses for defendants, taken by consent of attorneys at office of Wright & McKissick, in the city of Memphis, on 27th day of September, 1867.

Said Byers, aged 54 years, being first duly sworn, deposeth and saith as follows:

Question by def't's atto. Please state your residence and occupation, and for what length of time you have been engaged in such occupation.

Answer. I reside in Murfresboro', Tenn., & am a conductor
111 on the Nashville & Chattanooga Railroad, & have been engaged in my present business for 11 years past, with exception of the time during the war the road was in possession and control of the federal army.

Question 2nd. Please state what your duties were as such conductor for the past two years, and more particularly on or about the month of March, 1867; & also state whether you were conductor of passenger, freight, or any special train—state fully how this is.

Answer. I have been since the 14th April, 1866, running between Stephenson & Chattanooga as conductor of the freight train known as the Stephenson freight train, running between Chattanooga, Tenn., & Stephenson, Ala. This train was destroyed in hauling the freight of Memphis & C. R. R. Company to and from Chattanooga, and doing what little local business might be to transact at the intermediate stations between Chattanooga and Stephenson.

112 Question. Was or not the train upon which you were conductor employed exclusively for the purpose of transporting freights of the M. & C. R. R. Co. over the line, and were you or not engaged in such business during of March, 1867?

Answer. It was, & I was so engaged during that month.

Question. Please state the schedule upon which this train left Chattanooga for Stephenson during the month of March, 1867; also state how long the schedule had been established prior to that time, & how long after 1st of March, 1867, you continued with this special train to leave Chattanooga upon the schedule you have stated.

Answer. The schedule upon which I ran this train from Chattanooga to Stephenson during this month was to leave Chattanooga at 5 45
113 a. m., and it went into effect 27th January, 1867, and continued, as I recollect, till about the 1st day of May, 1867.

Question. Please state whether the train, as used by you for this purpose, belonged to the M. & C. R. R. Co. or the N. & C. R. R. Co's. State how this is, & whether freights for the M. & C. R. R. from Chattanooga were transported during this time upon any other trains or other schedule than 5.45 a. m., & the under your charge.

Answer. The freights for this (M. & C. R. R.) were hauled in these cars by our engine, under a contract existing between the two roads to that effect; all freights for the M. & C. R. R. were carried upon this schedule 5.45, and my train was for the special purpose of transporting freight for M. & C. R. R.; but frequently, there being more than my engine could pull, some of the cars loaded with their freight were
114 carried by the train which left on the same schedule, 5.45 a. m.

Question. Please state whether or not you were in Chattanooga, Tenn., during the freshet in the month of March, 1867; if so, please state when you arrived there, if before the freshet had reach its height, or in its ; how long you remained there; & whether or not you were in charge of this train before mentioned; and what exertions were made by you to run your train through to Stephenson's; & what obstructions were in your way and prevented you in doing so.

Answer. I was there all the time; had made a trip the day before from Chattanooga to Stephenson & back. I, on the morning of the freshet, was in rear of a train en route to Stephenson, Ala., & went out some two & half miles from Chattanooga, & had to return, owing to obstruction on road.

115 Question. Was or not the only freights for the Charleston R R. carried on your train, or other trains running on the 5.4 (o'clock) a. m.

Answer. Their freights went out on that time only, & chiefly in my train.

Question. Please state if you, as conductor of this special train, took charge of all the freight which was to be transported to Stephenson for the M. & C. R. R., on the morning of this freshet.

Answer. I could not state that I had it all, & Delong had an engine for that road & might have had freight.

Question. What were the obstructions in your way on the morning you made the start from Chattanooga & had to return, & how long did such obstruction remain in your way, and what exertions were made by the R. R. company to remove the same; how long before you
116 resumed your [your] regular schedule?

Answer. I could not state, as the train in advance had to return, & I, being with my train in rear of it, had to back in to Chattanooga. We made no attempt to make our trip after this, owing to the bridges giving way and the continued rise of the water. No train went through until the water went down & the bridges were repaired. The railroad company could do nothing but inspect the roads until the water subsided when they repaired everything as rapidly as possible. When the roads were repaired the trains resumed their regular trips.

Cross-examined by pl'ff:

Did you carry all the freight to Stephenson intended for the Memphis & Charleston R. R.?

Ans. No, sir, I did not; because sometimes I could not haul it
117 all; when that was the case the front train took some of it.

Quest. Did you know always when other trains took M. & C. freight, or might it not have been sent by trains without your knowledge?

Answer. I don't know that I could say that I always knew it; it might have been put on other trains without my knowledge, and they might have gone out first & I followed.

Quest. Was it your business to inform yourself, or to know anything about other trains or freight except your own?

Ans. It was not, sir.

Then freights belonging to the M. & C. R. R. might have been sent out from Chattanooga to Stephenson without your knowledge, & by trains at times when you were not running, might it not?

118 Ans. It might have been done, but I don't think any ever went out except in the morning.

Quest. Please explain how many schedules for freight & passenger trains there were at Chatannooga in March, 1867, and the time that each left, & how they were designated?

Ans. Leaving Chattanooga there are two passenger trains designated as schedules Nos. 2 & 4; there are also two freight schedules leaving Chattanooga, Nos. 6 & Nos. 8. In March, 1867, No. 6 left 5.45 a. m.; No. 8 left Chattanooga at 8 o'clock p. m.

Quest. Are you well acquainted with the town of Chattanooga, & the different localities in the town?

(Question & answer excepted to by def't's counsel.)

Ans. Tolerably well.

Quest. Do you know a place called the Cameron Hill in Chattanooga?

(Question and answer excepted to by def't's counsel.)

119 Ans. Yes, sir.

Quest. Was it above overflow during the freshet in March, 1867?

(Question & answer excepted to by def't's counsel.)

Ans. It was a long ways above overflow; the highest part, I expect, is 200 or 300 feet above.

Quest. How far is Cameron's Hill from the N. & C. & M. & C. R. R. depots?

(Question & answer excepted to by def't's counsel.)

Ans. The foot of the hill is not more than five or six hundred yards from either of them.

Quest. Were there any other hills or plains in Chattanooga above the overflow; if so, how many and how far are they from the depots?

(Question & answer excepted to by def't's counsel.)

Ans. There are others there, but I don't know how many. There
120 are several hills, but I don't know any names for them; some of them are within two hundred yards of the depots. It is about 200 yards to the foot of the hill upon which the stone fort is located; this hill was above the overflow.

Re-examined by def't's counsel:

Question. Was or not the freight train leaving Chattanooga during the month of March, 1867, a through train for Nashville, & did it or not

leave freights at Stephenson, or other intermediate stations between Chattanooga & Nashville?

Answ. I can't state, as I was not on any train save my own.

& further saith not.

M. S. BYERS.

Sworn to before me this 27th of September, 1868.

ISAAC MORRISON,
U. S. Com'r.

121 J. F. MARTIN, witness—age, 42 years—being duly sworn, says as follows:

Question 1st. by def't counsel. Please state your residence and occupation, & how long you have been engaged in such occupation.

Answer. I live at Larkinsville, Alabama, and am station agent for the Memphis & Charleston R. R. Company at Stephenson, Alabama; and have been agent for said road at Stephenson since October, 1866.

Quest. 2d. Please state what contract or arrangement, if any, exists between the M. & C. R. R. & N. & C. R. R. relative to transfer of freights from Chattanooga to Stephenson, how the same is effected, and what method and means are used and employed to effect such purposes, and how long such an agreement has been in effect.

Answer. I never saw any contract; the arrangement is beween
122 the two roads to have the Memphis & Charleston cars loaded with their freight at Chattanooga, and hauled by an engine of the N. & C. R. R. to Stephenson. I don't know how long this arrangement has been in force, but I found the matter of transfering freights from Chattanooga to Stephenson to be as above stated when I went to Stephenson in October, 1866.

Question by same. Please state if such was the arrangement in March, 1867, relative to the M. & C. R. R. Co. freight.

Answer. It was.

Question. Please state if during the month of March, 1867, you, as agent of the M. & C. R. R., received freight from all the freight trains passing from Chattanooga to Nashville, to be sent via M. & C. R. R. west, or whether or not all your freight from Chattanooga was sent by a particular train. State all about this matter, & at what time & upon what schedule this freight was received during this month.

123 Answer. I generally received all the freight for this road (M. & C. R. R.) in the forenoon by what I termed the Byers train.

I might have received freight by other trains, but invariable in the forenoon from trains running on the Byers schedule, at that time leaving Chattanooga at 5.45 a. m.

I don't recollect of ever having during that time received freight from any other train than the morning freight from Chattanooga.

Question. Was or not this Byers train a train run exclusively for the transportation of the freight for your road at this time? State how this is; & was it or not generally sufficient for that purpose?

Answer. That is my understanding.

Cross-examination waived.

And further deponent sayeth not.

J. F. MARTIN.

Sworn to and subscribed before me this 27 day of September, 1867.

ISAAC MORRISON, *U. S. Com'r.*

124 Fifth. The defendant then introduced J. R. Weaver, whose deposition is also contained in Exhibit No. 3:

He proved that he was the agent of the Memphis & Charleston Railroad Company for receiving and forwarding freights at Chattanooga, Tennessee, and was the agent there during the month of March, 1867.

He recollects receiving and forwarding the 163 boxes of tobacco sued for in this case.

He has an indistinct recollection of the agent Price, who was with the tobacco, but could not describe him, or know him if he saw him. He received the tobacco from the Western & Atlantic cars on the evening of the 5th of March, 1867, and put it in the cars of the Memphis & Charleston Railroad Company, and turned the cars over to the agent of the Nashville & Chattanooga R. R. Co. by four o'clock of the same
125 evening, to be shipped on the regular Memphis freight train on the morning of the 6th, at 5.45 o'clock a. m.

Witness thinks he did not tell Price that his tobacco would go at 6 o'clock that evening; that is, the evening of the 5th.

Witness could not have told him so, for it would have been false; was the agent for receiving and forwarding freight, but he had nothing to do with the running of trains, and no control over them or their time of departure, and never assumed to have any.

The time of departure of freight and trains was and still is regulated by the general superintendent, who supervises and controls the whole route, and makes out from time to time a schedule, or time-table, showing the departure and arrival of every train at every station, from Memphis to Chattanooga.

This schedule is printed, and published all along the line of the
126 road for the governance of the officers and agents of the road, and the information of the public.

This printed and published time-table no agent for receiving and forwarding freight ever assumes to vary or control; but all obey it until changed by the superintendent. Witness then proved the two time-tables which had been printed and published before, and were in force upon the road during the whole of the month of March, 1867; and by this time-table only one freight train with freight for the Memphis and Charleston r'road left Chattanooga each day during that month, at 5 o'clock and 45 minutes a. m.

The Memphis & Charleston railroad track extends from Memphis, Tennessee, to Stephenson, Alabama; but the Mem. & Chas. R. R. Co. had a contract with the Nashville & Chattanooga Railroad Co.,
127 whose track extended from Nashville, via Stephenson, Alabama, to Chattanooga, by which contract the Memphis and Charleston Railroad Co., for a certain sum per month, were permitted to keep an agent with cars at Chattanooga, receive freight for Memphis, or any intermediate point on the Memphis road, and the cars laden with freight would be drawn by an engine belonging to the Nashville and Chattanooga Railroad Company, and controlled by an engineer in the employ of the latter company, once a day to Stephenson. As before said, the Memphis freight train, by the schedule and time-table in force in March, 1867, only left Chattanooga at 5.45 o'clock a. m.

The invariable usage of witness at Chattanooga, as receiving and forwarding agent of the Mem. & Cha's. R. R. Co., has been to receive
128 freights and put them into the cars of his road, and have the way-bills made out during the day, and then turn them over during the same evening to the agent of the Nashville and Chattanooga road, to be forwarded the next morning on schedule time. On the 5th of &

during March, 1867, there was no freight train or passenger train left Chattanooga at 6 o'clock p. m. The passenger train left at 8 p. m., and the freight train at 8.37 p. m.; but this freight train carried the through freight to Nashville, and not the freight of the Memphis & Cha's. R'road Co. If the cars containing the tobacco had left Chattanooga on the evening of the 5th of March, 1867, instead of on the morning of the 6th, it would not have hastened the arrival at Memphis of the tobacco, for the only freight train leaving Stephenson for Memphis, left at 1 o'clock & 10 minutes p. m. every day, and a train leaving Chattanooga at
129 night, on arriving at Stephenson the next morning, must wait to 1.10 p. m.; and a train leaving Chattanooga at 5.45 a. m. would reach Stephenson in time for the departure of the train at 1.10 p. m.

Witness could not have promised Price that the tobacco would leave Chattanooga at 6 p. m. of the evening of the 5th of March, for it would have been false.

This was all the testimony in the case.

The defendant asked the court to give the jury the five following instructions found in Exhibit No. 7, to wit:

130 *Exhibit No. 7.*

First. That the agents of a company are confined to their several spheres of opperation.

Clerks or keepers of books, who record the transshipment of goods, make out way-bills, &c., are not such agents as would bind the company by agreement for the departure or forwarding of freights; and that if the jury believed the conversations deposed to by Price were had with Corbin, the clerk, the company would not be bound by them.

Second. If an agent assumes to make a contract in contravention of the common course of the business of the company, or of their published rules and regulations, it will not bind the company. So if the jury believed that a contract was made with Price by Weaver that the tobacco should go at six in the evening, and it was not in the
131 course of the business to send a freight train at such hour, but other hours had been established by published rules and regulations, then said agreement would not bind the company.

Third. That if the jury shall believe that the freight train with the tobacco was stopped on the morning of the 6th by the falling of rock on the track and the washing away of the bridge, and was obliged to put back to Chattanooga in order to send force and implements to put the road in repair, then such delay was inevitable, and would not subject the road for any consequential damages, the immediate cause of the damage being the flood.

Fourth. That when the damage is shown to have resulted from an immediate act of God, such as a sudden and extraordinary flood,
132 the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case.

Fifth. If the freight train carrying the plaintiff's tobacco left Chattanooga on the morning of the 6th of March, 1867, on its proper time under the contract, and was prevented from going forward by obstructions on the track or the washing away of part of Running Water Creek bridge, caused by an extraordinary fall of rain & freshet, and was deluged at Chattanooga by these obstructions, or either of them, until the tobacco was injured by the subsequent freshet, which could not be avoided, then the delay at Chattanooga would not be negligence, and the defend-

133 ant would not be liable for the injury caused by such subsequent freshet, if such freshet was such as is described in the former instructions of the court as an act of God, provided the defendant used all proper diligence to rescue the property from injury at Chattanooga, or provided the freshet was so sudden and overwhelming as to prevent rescuing it; in other words, if the train was prevented from going to its destination at Stephenson by the obstructions and falling of the bridge aforesaid, then the defendant would not be liable for the injury caused by the freshet at Chattanooga, because during the delay there the def't might have removed the train to Wahatchie or Whiteside station, beyond the reach of the freshet at Chattanooga, provided the freshet at Chattanooga was such as no human foresight could have anticipated; and especially would this be case if Chattanooga was the proper & regular place to keep trains & start them to Stevenson, & Wahatchie & Whiteside were merely wayside stations, and were not depots where trains were properly and usually delayed and taken care of.

134 But the court refused to give said instructions, and instructed the jury as follows, to wit:

A common-carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. They are of two kinds—carriers by land and carriers by water. When a carrier receives the goods, it is his duty to take all possible care of them in their passage, and deliver them safely at their place of destination at the time agreed upon, or, in the absence of any stipulated time, within a reasonable time after receiving them. At common law, a carrier by land is in the nature of an insurer, and is bound to keep and carry the goods entrusted to his care safely, and is liable for all losses and injuries which may happen to them in the course of transportation. And to this liability he is held at all events, unless he can prove that the loss or injury happened from the act of God, or the public enemy, or by the act of the owner of the goods. These principles of the

135 common law defining the duty and regulating the liability of common-carriers are of great antiquity, and seem too well-established by the decisions of the courts, both in England and in this country, to be now disturbed. Cases have arisen, and, no doubt, will frequently arise, in which, by the strict application of the principle thus established, very great hardships may result to the carrier, but, nevertheless, the wisdom of the rule in relation to this subject has been too long and too uniformly attested by judicial sanction to be departed from.

In the case we are now trying, it seems to be conceded that the loss or injury complained of by the plaintiff was not occasioned by the public enemy, nor by the act of the owner of the goods in controversy; and it follows that if the defendants is to be relieved from his liability as a carrier, it must be upon the ground that the loss was occasioned by the act of God; that is, if the plaintiff has shown that any loss or injury was sustained while the goods were in the care and custody of the defendant.

The questions, then, which arise for the consideration of the jury, are:

136 "1st. Did the defendant receive the tobacco, as alleged in the plaintiff's declaration, for transportation from Chattanooga to Memphis; and, if so, 2d, was the tobacco injured or damaged after being so received; and, if it was, then, 3d, was such injury occasioned by the act of God, in the legal acceptation of the term?

"What is 'an act of God' is a question of law, and, according to Lord Mansfield, who defines it as intelligibly, perhaps, as it can well be, it means something in opposition to the act of man, some act which man

could have had no agency in producing; that is to say, if the alleged loss be shown to have arrisen from such an act as 'could not have happened by the intervention of man, as by storm, lightening, or tempest,' the law will relieve the carrier from responsibility for such loss.

"In view, then, of the principles of law, as they are above stated, in respect to the duty and liability of carriers, & of the evidence
137 which has been submitted to the jury by the parties, respectively, the court gives, as part of its charge to the jury, the following instructions by which they will be guided in making up their verdict in this cause:

"1. I you shall be satisfied from the evidence that the tobacco of the plaintiff was received by the defendant at Chattanooga to be transported for him to the city of Memphis, and that while it was in the care and custody of the defendant it was damaged by water, the law presumes against the defendant, and the defendant will be liable to the plaintiff for the damage sustained, unless it appears from the evidence that the loss or damage was occasioned by the 'act of God.'

"2. If you shall be satisfied from the proof that the tobacco was injured while the cars upon which it was being shipped were standing at the depot in Chattanooga by a freshet which submerged the cars containing the tobacco, and that no human care, skill, and prudence could have avoided the injury, then such injury would be occasioned
138 by the 'act of God,' and the defendant would not be liable. But, if you believe that the cars containing said tobacco were brought within the influence of the said freshet by the act of the defendant, or its agents, and that if the defendant or agents had not so acted the tobacco would not have been damaged, then the injury would not be occasioned by the 'act of God,' and the defendant would be liable for the damage sustained.

"3. If you shall believe that the tobacco in question was received at Chattanooga by the defendant on the evening of the 5th of March, 1867, and that the agent of the defendant having the charge of the freights at, and superintending their shipment from, that point to Memphis, made a contract with Price, the agent of the plaintiff, by which the said tobacco was to be sent forward for Memphis on the same evening, and that the said agent of the defendant did not comply with said contract or
139 engagement so made with the agent of the plaintiff, but held the tobacco over until the next morning's train, and, as a consequence of such delay, the tobacco was injured by a freshet in the rivers and creeks contiguous to Chattanooga, and which freshet would not otherwise than by said delay have caused the said injury, then the defendant can claim no exemption from its liability as carriers on account of any injury or damage occasioned by the said freshet, and you will find a virdict in favour of the pl'ff.

"If you shall believe that the tobacco in controversy was not sent forward from Chattanooga, en route for Memphis, until the morning of the 6th of March (and this in the absence of any such contract as stated in the preceeding instruction), and that the train upon which said tobacco was being transported was delayed and hindered in its progress by an obstruction upon the track of the road some two and a half or three miles from Chattanooga, which obstruction was occasioned by a slide or tumbling of a rock from the mountain side along which the track of the
140 road is located, and in consequence of said obstruction the said train returned to the depot at Chattanooga, when, by a diligent effort on the part of the defendant's agents the obstruction might have been removed and the train gone through to Whiteside station, or some

other point on the road where no injury would have resulted; and if you believe that while the train was so at the depot at Chattanooga the tobacco aforesaid was damaged as alleged, then the returning of the train to Chattanooga was the immediate cause of the injury, and not the freshet; and the injury would not be caused by 'the act of God,' man's agency having intervened, and the defendant would not be relieved from liability, and the plaintiff will be entitled to a verdict in his favour.

"5. That the loss or damage to the goods in question, if produced by a rise, or freshet, in the river or creeks in the vicinity of the depot where the train was standing, such rise, or freshet, to constitute it 'the act of God,' in a legal sense, must have been so sudden, immediate, and
141 unforeseen as to leave the carrier no sufficient time or means of escape from its consequences. But if it be not shown by the evidence that such was the fact, then it was the duty of the defendant or its agents to save the property of the plaintiff from the impending danger, if it were possible to do so, by extraordinary exertion. If the damage could have been prevented by any means within the power of the defendant or its agents, and such means were not resorted to, then the liability of the defendant would not be relieved, and the jury must find for the plaintiff.

"6. That under the contract between the Nashville and Chattanooga Railroad Company and the defendants in respect to the transportation of the freights of the latter over the road of the former the same duty and liability attached to the defendant, when it received goods to be transported over the Nashville & Chattanooga road, as if the same goods were to be carried over its own road."

142 The defendant excepted to the action of the court in refusing the instructions aforesaid, and also in giving the charge aforesaid, and also in overruling his motion for a new trial, and tenders this his bill of exceptions to the judgment and action aforesaid of the court, and prays that the same may be signed by the court and made part of the record of the cause; which was accordingly done.

This day of April, 1868.

(Signed) CONNALLY F. TRIGG. [SEAL.]

143 UNITED STATES OF AMERICA,
District of West Tennessee:

I, Abram S. Mitchell, clerk of the United States circuit court for the district of West Tennessee, do certify that the foregoing one hundred and forty-two pages of manuscript contain a full and true copy of the record and proceedings had in said court, in the case Samuel Reeves, plaintiff, against the Memphis and Charleston Railroad Company, as the same remain of record and on file in my office.

Given under my hand and the seal of said court, at office in the city of Memphis, this 6th day of January, A. D. 1869.

[SEAL.] A. S. MITCHELL, *Clerk.*

144 *Bill of cost.*

Circuit court U. S., March term, 1868.

680.

SAMUEL REEVES
versus
THE MEMPHIS & CHARLESTON RAILROAD COMPANY.

Judgment 26th day of March, 1868.

For debt	$
For damages	$10,946 01

CLERK'S FEES.

Issuing 1 summons, and seal, $1 20 each; 1 certificate on do., 15c. each; bond for cost, 30c.; filing do., 10c.; 1 certificate on do., 15c.; filing declaration, 10c.; certificate on do., 15c.; 1 copies of do., 2 10; rule to plead, 15c.; filing 1 plea, 10; 1 certificate on do., 15; filing replication, 10c.; 1 certificate on do., 15c.; filing 12 other papers in cause, 10c. each, 1 20; 12 certificates on same, 15c. each, 1 80; issuing 2 s'p'as. for witnesses, 25c. each, 50; com's for depositions, each; administering 5 oaths, 10c. each, 50; 1 continuances, 15c. each; order for judgment by default, ; final judgment, 45; order for costs, 15c.; judgment against security, ; order for execution, 15c.; issuing execution, $1 20; certificate on do., 15c. copying and filing costs, 45; certificate, 15c.; making dockets, indexes, &c., 3 00; enrolling cause, 4 75; entering and filing 3 returns, 75; revenue stamp, ; 7 orders, 15c. each, 1 05	43 50	
Record for Supreme Court	1 05	
Bond, 75; 2 acknowledgments, 50; citation, 50; writ of error, 1 20	2 95	
		67 50
Com'r A. S. Mitchell taking 1 deposition	4 00	
" Morrison " 2 do.	7 00	
		11 00

CURRIE—MARSHAL'S FEES.

Executing 1 summons, $2 00; executing 3 subpœnas, 50c. each, 1 50; miles of travel in serving process, c. each		3 50

ATTORNEY'S FEE.

Docket fee on 17 depositions—1 for pl'ff & 16 for def't	42 50	
Docket fee in court	20 00	
		62 50
		$144 70

A. S. MITCHELL, *Clerk*,
ISAAC MORRISON, *D. C.*

Received above costs Jan'y 6, 1869.

A. S. MITCHELL, *Clerk.*

145 Supreme Court of the United States.

THE MEMPHIS & CHARLESTON RAILROAD COMPANY
vs
SAMUEL REEVES. } In error.

Know all men by these presents, that we, the Memphis & Charleston Railroad Company, principal, and Sam. Tate, M. J. Wieks, and W. B. Waldran, sureties, are held and firmly bound unto the above-named Samuel Reeves in the sum of twenty-two thousand five hundred dollars, to be paid to the said Samuel Reeves, his executors, and adminis-

trators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly, by these presents. Sealed with our seals, and dated the 15th day of April, 1868.

Whereas the above-named Memphis & Charleston Railroad Com-
146 pany hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of West Tennessee, on the 26th of March, 1868, in favor of said Reeves, against said Memphis & Charleston Railroad Company, for the sum of ten thousand nine hundred and forty-six $\frac{01}{100}$ dollars, and costs of suit:

Now, therefore, the condition of this obligation is such, that if the above-named Memphis & Charleston Railroad Company shall prosecute its said writ of error to effect, or shall comply with and perform the judgment of the court in case of its failure to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE MEMPHIS & CHARLESTON R. R. CO.,
By SAM. TATE, *President.* [SEAL.]
SAM. TATE. [SEAL.]
M. J. WIEKS. [SEAL.]
WM. B. WALDRAN. [SEAL.]

147 We agree that the foregoing is a true and correct copy of the bond executed by the plaintiffs in error at the day it bears date, and approved by the circuit court at that day, and that the original has been unintentionally lost or mislaid from the files by some officer of the court, and we waive the necessity of making affidavits of the loss and of the correctness of this copy; and on behalf of the defendant in error we agree that the foregoing copy may be substituted in the room and stead of the lost bond, if in accordance with the rules and practice of the Supreme Court of the United States, provided that this agreement is approved and signed by Gen'l Albert Pike, counsel for defendant in error, at Washington. Feb'y 16th, 1869.

WRIGHT & McKISICK,
Counsel for S. Reeves.
HUMES & POSTON,
McRAE & WALKER,
Att'ys for the M. & C. R. R. Co.

148 United States of America to Samuel C. Reeves, esq., greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden on the 1st Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Tennessee, wherein the Memphis & Charleston Railroad Company is plaintiff, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf. Witness the Hon. Conally F. Trigg, judge of the district court of Tennessee, presiding in the circuit court of the United States for the district of West Tennessee, this 18 day of April, 1868.

CONNALLY F. TRIGG, *Judge.*

(Indorsed:) 74 E. No. . Samuel Reeves vs. Memphis & Charleston Railroad Co. Citation.

Filed 18 April, 1868.

A. S. MITCHELL, *Clerk*,
ISAAC MORRISON, *D. C.*

Executed and served the within citation on Wright & McKessick, attorneys of plaintiff, Samuel Reeves, this 21st day of April, 1868, by making known the contents of the within citation to them, and leaving a copy of the same with them.

J. M. TOMENY, *U. S. Marshal*,
By J. B. BINGHAM, *Dep'ty U. S. Marshal.*

149 (Indorsement on record:) W. Tennessee C. C. U. S. No. 454. The Memphis & Charleston Railroad Company, pl'ff in error, vs. Samuel Reeves.

Filed 13th April, 1869.

Supreme Court of the United States.

MEMPHIS & CHARLESTON R. R. Co.
v.
SAMUEL REEVES.
No. 220.

The judgment complained of is founded on the damage to 163 boxes tobacco, received on the cars of the appellant on the evening of the 5th March, 1867, at Chatanooga, to be transported on the Nashville and Chatanooga road as far as Stevenson, and by the appellants' road from that point to Memphis.

The damage was occasioned by a flood that submerged the whole city, and which rose very many feet above the highest water known to *history or tradition.*

The freight thus received on the evening of the 5th was sent forward by the first train on the morning of the 6th. The time for departure from Stevenson to Memphis, is fixed by schedule to conform to the time for sending the Memphis freight from Chatanooga.

This train had not proceeded many miles ere it found the way obstructed by rocks and land slides. Fifteen miles from the city a bridge had been carried away. It therefore returned to the city. The trains were immediately placed on the most elevated portion of the track.

This track is shown by the evidence to have been located several feet higher than any flood previously known.

The water had been rising many days; but all the citizens and employees of the several roads judging the future by the past, considered themselves perfectly safe in placing their cars at a point which the highest water previously known had never reached.

The evidence shows these expectations were fatally disappointed, and the universal destruction of property, as well of individuals as of various rail roads passing through that city, shows that the loss was not occasioned by negligence, but by causes beyond control.

The plaintiff sought to recover on the ground that the company was bound by special contract, to send forward the freight on the evening of the 5th; and that if they had done so, the damage would not have happened.

The Court in its third direction to the jury charged--that if the tobacco was received on the evening of the 5th March, 1867, at Chatanooga, and that the agent of defendant having charge of the freights and superintending the same, *made a contract* with Price, the agent of plaintiff, that the tobacco was to be forwarded same evening, and that this was not complied with; but the tobacco was not forwarded until next morning, and that, as a consequence of this delay, the property was destroyed by the freshet, and that it would not have been destroyed but for this delay--then the defendant can claim no exemption from liability as carriers on account of any injury from the freshet, and the jury will find a verdict for plaintiff. p. 38.

The only witness examined by plaintiff is their agent Price. p. 7.

He testifies, he was directed to ship the tobacco from Saulsbury N. C. to Memphis, he did so, and followed in the passenger train. The tobacco, he says, arrived at Chatanooga on the 6th March, (this is an error, the evidence shows it was on the 5th.) The tobacco was unloaded about four p. m., and remained on the platform about an hour when it was put into two cars, Nos. 534, and 545, of the Memphis and Charleston R. R.; "after this was done, I went to the agent of the M. and C. R. R., and told him my tobacco was loaded in his cars. He replied that if the bills were brought over in half an hour, the tobacco

would leave that evening at 6, but otherwise it would not get off until the next morning. After supper he returned to the agent, who "said that the bills had been received, and that the tobacco would leave at 6 that evening—it was then near about that hour. I thanked him for his immediate attention to my freight, and left that night by passenger train at 9 for Memphis."

This is the whole evidence offered by plaintiff. The case shows from the published schedule, and the oral proof, that it is impossible that any such conversation could have occured. We, however, admit its truth for the purpose of the agument.

There is nothing in this evidence, such as it is, to authorize the Court to submit to the jury, the finding of *a contract* to forward this freight on the night of the 5th."

The freight had been shiped by the Western and Atlantic R. R., and when it reached Chatanooga had been transferred into the cars of the defendant, before these, pseudo conversations are said to have occurred. When ~~they~~ left Saulsbury, ~~they were~~ it was destined for Memphis. The W. & A. R. R., were the consignors. See Corbin's Evidence, p. 12.

They made no part of any contract or agreement, whether the statement was made or not, the duty of the company was to forward the freight thus received, using due diligence for this purpose.

There was no new agreement at Chatanooga for freight or for any other purpose. The freight had been arranged at Saulsbury, and was collectable at Memphis, the terminus.

The promise was not exacted by the agent Price. It was a volunteer statement merely.

Even in case of fraudulent representation, it must relate to something which is of the essence of the contract. If the contract would not have been made but for the representation, then it is material, but if the same thing would

have been done by the parties in the same way, if the representation had not been made, then it is not material.

2 Parsons on Cont. 267.

Addington *v.* Allen, 11 Wend, 378.

Whether the promise to forward the goods that evening was made or not, it had and could have had no influence in the action of the plaintiff. The goods were received at Chatanooga as part of the through freight from Saulsbury, as already said, and not by virtue of any agreement made at Chatanooga.

But supposing we admit that there was a contract to forward on the evening of the 5th, the damage occasioned by the flood on the 6th cannot be referred to a violation of that contract.

The subject is fully considered by the Supreme Court of Pennsylvania. A canal boat containing the goods was wrecked at Piper's dam by an extraordinary flood. Great delay at the arrival at this point had been occasioned by reason of the boat having been towed by a lame horse. But for this the boat would have passed that point long before the occurrence of the flood. It was held that this cause was too remote, "*causa proxima non remota spectatur.*"

"There is nothing, say the Court in the law of common carriers that calls for a different rule. They are only answerable for the ordinary and proximate consequences of neglect, and not for those that are remote and extraordinary."

Moneson *v.* Davis, 20 Penn. State R. 171.

This is also decided by the Supreme Court of Massachusetts. Owing to defective machinery the goods did not arrive for six days after they were due, and then were destroyed by a flood. The Court said "the negligence of the carrier was remote: it had ceased to operate as an active efficient and prevailing cause as soon as the wool had been

carried beyond Syracuse, and cannot therefore subject the carrier to responsibility for an injury to the property resulting from a subsequent inevitable accident which was the proximate cause by which it was produced.

Demy *v.* N. Y. R. R. C. 13 Gray 487.

In a case decided by the Supreme Court of New York where the liability of the carrier was maintained and the damage was occasioned by a flood, the decision was placed expressly upon the gross neglect of the company.

Michaels *v.* N. Y. R. R. C. 30 N. Y., 575.

Though the proximate cause may be occasioned by inevitable accident, the carrier is still bound to care and dilligence. Yet no greater foresight of extraordinary perils is expected of him than other men, and no greater penalty visited for its failure.

When he discovers himself in peril, the law requires of him ordinary care, skill and foresight.

This is defined to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. It means as difficulties increase in great danger great care is the ordinary care of a prudent man.

Morrison *v.* Davis, Supra.

If one uses the precautions which a reasonable man would use under the circumstances, he is not responsible for omitting other precautions which are conceivable, even though if he had used them the injury would certainly have been avoided.

Shear and Red. on Neg., p. 7.

Now as to the qestion of proof of negligence. The rule is admitted to be that the burden of proof is on the carrier to show that the loss was occasioned by a cause for which he is not responsible.

When however the evidence brings the loss within the

excepted danger, the *onus prob and* is changed. It is then upon the plaintiff to show that the danger might have been avoided by the exercise of reasonable skill and attention of the carrier.

Clark et al *v.* Barnwell, 12 Howd. 280.

The evidence is full to the point that due diligence and care were used to avoid the threatened danger. It will be observed that the plaintiff produced no witnesses on this point, all the evidence on the subject was given by witnesses called by defendant.

John B. Whitesides, engineer, testifies that the track from the depot to Lookout Point was located three feet higher than the flood of 1847; and this was the highest flood known to tradition or history. He was at Chatanooga at the time of the disaster. There was no apprehension that the flood would rise as high as the depot. It rose so rapidly and so much against the apprehension of any one, *that he lost the furniture in his residence*, which is three feet higher than the depot. The Western and Alantic Road had its freight damaged by the same cause. p. 11.

Columbus Philips, merchant. During the night of the 7th we carried our stock up stairs, but a *great many who had one-story buildings lost their stock or had it greatly damaged.* p. 13.

Tomlinson Fort. I felt no apprehension myself as my office was at least three feet above Market street. I left my books and furniture in my office, I tried to remove them on Friday, and succeded in doing so with a boat through the window. *I think no merchant saved any large portion of their goods without damage.* In company with the Mayor on Saturday the 8th, broke open cars on the general delivery track belonging to the Nashville and Chatanooga and Western and Atlantic Roads, and took out bacon and flour *to feed the starving population who had fled to the surrounding hills from their homes.* p. 14.

Charles A. Tillman, despatcher of freights. The train did not go out on the morning of the 6th, because of rock on the track under the mountain, and the washing away of the bridge at Whiteroads, 15 miles distance.

On cross examination he is asked if the cars could not have passed on the ground beyond Wauhatchie on the 6th, 7th, or 8th of March. He answers, that they could on the morning of the 6th, "but could not on the 7th or 8th." On examination he is asked if there was any ground to apprehend, or any apprehension up to the night of the 7th that the depot and ground would be submerged, he answers, "There was none, sir. There warn't a man in Chatanooga who ever thought water would get high enough to submerge them. p. 15.

John B. Weaver, agent. No one on the 5th or 6th anticipated the extent of the freshet as it afterwards occured. After it became so great as to threaten the cars, it was not possible to remove them to a place of safety: *as an evidence of this, none of the freights of any of the roads was saved.*

He is asked on cross examination, whether the freight turned over by the N. & C. R. R., on the evening of the 5th, could not have been sent to a place of safety somewhere on the road? Answer. *If the height of the flood had been anticipated*, we could have sent it to Atlanta or Knoxville, possibly to Whiteside. p. 16.

I. F. Jackson, agent of W. & A.R.R. After it became probable that the cars would be submerged, it was not possible to remove the freight from the cars to a place of safety. The first apprehension was on the evening of the 7th. The cars could not be moved, as the water was so deep it put out the fire of the engine.

On the evening of the 7th, I thought the yard would be submerged, the water was just coming over our track, I made an effort to save our freights on that evening, and pulled out one train of 37 cars. I pulled these out on a

piece of the track of the East Tennessee road that had not been submerged. There were about 1000 yards of that track three-quarters of a mile from the depot above overflow. In coming back the track had given way, and the water was so deep that the fires were put out, and consequently we could get no more out. p. 18.

S. B. Love. Located his iron mill three feet above the highest water mark ever known, the floor being on a level of the track of the N. & C. R. R.

On Thursday the water had risen nearly to the floor. On that day there was a heavy rain, and anticipating a further rise not exceeding two feet, removed his machinery and property 3 feet higher. Worked to 11 o'clock that night and went to bed in the upper room, satisfied that he had saved the property. On awaking in the morning, found that the water had risen 5 or 6 feet, and every thing he had endeavored to save submerged or floated off His loss was $11,500. p. 20.

Wm. J. Pryor, agent of the Nashville & C. R. R. Freights delivered to the Memphis and Charleston R. R. on the evening of the 5th, by the rule and schedule of the road, should go out on the morning of the 6th. On the morning of the 6th we started out, and, after proceeding some distance, found the road obstructed by rocks. The trains had to return to Chatanooga until these were removed. While we were clearing the track, a telegraph was received that the bridge at Runningwater had been washed away. Col. Yates immediately proceeded there to repair it; while there, the water rose this side of him and cut him off. *The Memphis cars were placed on as high ground around the depot as we had.* Up to the night of the 7th, that the cars in our yard were in the least danger—when the danger began to be apprehended—there was no higher ground, as stated, on our own track, and none on that of the Western and At-

lantic. There was on the East Tennessee and Georgia road; but Ragsdale, the agent of that road, would not give permission to use it, as he was apprehensive of a bridge some six miles off, and he wished to keep his road open to work on, and protect that bridge.

On cross-examination, witness testifies that there was high land between Wauhatchie and Whitesides, which is above overflow for some distance. He is then asked, whether the cars could not have been moved out to this high ground on or during the day of the 6th?

He answers: that they could not, and, for the reason, that there was known to be but one train, and the locomotive and part of another train between Whitesides and Chatanooga, and no train could have been sent out until those trains came in, which they did not do until 12 that night. p. 22.

This evidence is confirmed by the depositions of Dulong, conductor of the freight train, p. 25; of J. B. Yates, superintendent of the Nashville and Chatanooga R. R., p. 29; of Byers, conductor on said road, p. 31; of Martin, the station agent.

This being the evidence in the case, we confidently maintain, that each of the five propositions submitted by the defendant should have been given in charge, and that their rejection is error, for which the judgment must be reversed.

The brief of the appellee is chiefly devoted to considerations which avoid the merits of this controversy, and seeks on technical grounds to withdraw this case from the revisory power of the Court.

It is first objected that it does not appear from the bill of exceptions that the rulings of this Court were excepted to *during the progress of the trial.*

The fact that the trial was had on the 26th of March,

and the bill of exceptions was sealed at a subsequent day of the term, to wit, on 18th April, affords no valid objection.

All that is required is that the exception should in fact be taken at the trial. The mere record of the fact may be subsequently made. The decisions to this point are too familiar to need particular citation.

The bill of exceptions opens thus:—"*On the trial* of this cause the *following proceedings were had*, and the following evidence submitted to the jury."

These proceedings thus had on the trial of the cause, are the introduction, 1st. of a certain deposition of the plaintiff.

2d. Of a certain deposition on the part of defendant.

3d. Then the prayer of the defendant to the Court "to give the five following instructions," (which are set out.)

4th. "But the Court refused to give the instructions, and instructed the jury as follows."

5th. At the close of these instructions these words follow: "The defendant excepted to the action of the Court in refusing the instructions aforesaid, and also in giving the charge aforesaid."

Now it is certain that the exception to the action of the judge was a "proceeding," and a very important one, and the opening of the bill declares that all the "*following proceedings*" were had "*on the trial of the cause.*"

Dredge v. Forsyth, 2 Bl., 567.

Kellogg v. Forsyth, 2 Bl., 572.

Simpson v. Dall, 3 Wall., 460.

It is again said, that the exceptions are too general, and that they should have been specifically made to the several charges. It is to be observed that the charges were asked in the first place by the defendant. These were rejected, and the defendant excepted. Then the Court gave several charges, all involving the single question of negligence.

The substance of these was a denial of the doctrine asserted in the prayers of the defendant, and to these instructions the defendant also excepted.

We are aware that these exceptions are subject to remark, and perhaps to animadversion as not being in strict conformity to rule. But the reason on which this rule is based does not include within its scope this case.

The Court, in a recent case, has said "that justice to the court below requires that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception.

Hancy v. Tyler, 2 Wall. 339.

Now it is evident that the charges given are in direct response to the charges asked and refused, and no revision is now asked which involves a question that was not distinctly presented to the court below.

It is again urged that the motion made for a new trial was a waiver of the Bill of Exceptions.

This was not so considered by either of the parties or the judge below; for the bill was drawn up and sealed after motion had been made and decided.

After the repeated decisions of this court, it is a matter of surprise that so many pages of the brief should be occupied in this discussion.

This objection when last argued in this Court at the bar was very summarily disposed of; the Court dismissing the argument by saying: "The practice is every day otherwise."

U. S. v. Dashiel, 4 Wall. 135.

We submit, in reference to the bill of exceptions that this Court will not allow the right of review to be defeated because of any mere informality or irregularity in the mode in which the exceptions have been presented.

U. S. v. Morgan, 11 How. 154.

Simpson & Co., v. Dall, 3. Wall 460.

P. PHILLIPS,

Of Counsel for Appellant.

SUPREME COURT UNITED STATES.

No. 220.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, Plaintiffs in Error,

vs.

SAMUEL REEVES.

Supplemental Argument for the Defendant in Error.

ALBERT PIKE,
ROBERT W. JOHNSON,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE MEMPHIS AND CHARLESTON R. R. Co.

vs.

SAMUEL C. REEVES.

If the Court should find itself constrained to inquire whether the testimony in this case was sufficient to warrant the verdict of the jury, and whether there was error in the refusal of the court below to give the instructions asked, or in its charge to the jury, the principal facts proven will be found to be as follows:

Reeves sued the corporation as a common carrier for damage to freight received by it for carriage, caused by negligence and want of due care.

The merchandize injured consisted of 163 boxes of tobacco, which came from Saulsbury, North Carolina, to Chattanooga, reaching the latter place on Tuesday the 5th of March, 1867. At Chattanooga it was received by the Memphis and Charleston Railroad Company on the 5th of March, and re-loaded into two of its railroad cars, about 5 o'clock in the afternoon. [*Testimony of R. W. Price, Pr. Rec.* 7, 8.] This witness does not positively fix the day, but that is done by Corbin, a witness for the company, who gives the freight lists. *Pr. Rec.* 12.

Price proves that the agent of the company at Chattanooga promised that, if the bills were brought over in time, the tobacco should go forward at 6 o'clock that evening; and shortly before that time informed him that the bills *had* come over, and assured him that the tobacco would leave at that hour. *Rec.* 8.

It did not do so. Corbin, Stillman, Weaver, Pryor, Yates and Martin prove, [*Rec.* 12, 14, 16, 21, 30, 32,] that by the schedules and time-tables, by which the forwarding of freight was governed at the time, that received during one day was

forwarded the next morning, at, as some of them prove, 5.45 a. m., at which time the train started on which the tobacco in question was placed.

The Memphis and Charleston Railroad track extends from Memphis to Stevenson, Alabama, a point west of Chattanooga, on the Nashville and Chattanooga Railroad. Between Chattanooga and Stevenson, by a contract between the two companies, the trains of the M. & C. road are drawn by engines belonging to the M. & C. road, an agent of the Memphis and Charleston road being at Chattanooga and receiving freight and passengers there for Memphis. *Weaver, Rec.* 17.

At the time in question, J. R. Weaver was the agent of the Memphis & Charleston Road at Chattanooga. He admits receiving the tobacco on the 5th of March, [*Rec.* 16 & 35,] in the evening, putting it on the cars, and turning them over to the agent of the other company by 4 p. m. of that day, to go by the 5.45 train the next morning. He denies telling Price that the tobacco would go that evening, and says that he could not have told him so, for that the contract between the roads only permitted the M. & C. road to run one freight train a day, and that left Chattanooga at 5. 45 a. m. A freight train did leave Chattanooga, going west, at 8.37 p. m. on the 5th, but it carried freight of the Nashville and Chattanooga road only, and none for the M. & C. company. [*Rec.* 35, 36.]

If the tobacco had gone to Stevenson by the 8.37 p. m. train, it would have remained there until 1.10 p. m. the next day, and been taken up and carried on to Memphis on the arrival of the 5.45 a. m. train of the 6th. [*Rec.* 36.]

Stillman [*Rec.* 14,] says that the freight train for Memphis did not go out on the morning of the 6th, because of rocks fallen on the track under Lookout Mountain, and the washing away of a bridge at Whitesides, about 15 miles from Chattanooga.

Pryor, who was the agent of the Nashville and Chattanooga Company [*Rec.* 21,] says that the freight train *did* go out on the morning of the 6th, at the regular time, but found the road obstructed by rocks that had fallen during the night, and had to return, and in consequence of information of the washing away of a bridge on Running Water Creek, had to remain at Chattanooga. Dulong, the conductor, Yates and Byers corroborate this testimony. [*Rec.* 25, 29, 32.]

There are two other railroads [*Rec.* 22,] running from Chattanooga—the East Tennessee and Georgia Railroad, and the Western and Atlantic Road, which runs to Dalton, in Georgia.

Chattanooga is built on low ground, on the Tennessee River, which, a short distance west of it, runs along the base of Lookout Mountain. On the 5th of March there had been heavy rains for some weeks, and the river had been rising and was very high. The freshets of 1826 and 1847, the highest ever before known, had not submerged the ground on which the depot was built, or at least had not risen as high as the level of the railroad track there, which, Whitesides says, [*Rec.* 11,] was three feet above the high water mark of 1847.

Rains had fallen, Fort says, [*Rec.* 13,] for about three weeks before the 7th of March, both in Chattanooga and higher up the Tennessee River. The river rose gradually *until the evening of the 7th*, at which time it had reached what was generally considered the high-water mark of 1847. That night it rose an average of four inches an hour from 7 p. m. to 6½ a. m. of the 8th of March, and it continued to rise until about 2 p. m. of Sunday, the 10th of March. On Friday, at 1 p. m., the engines standing on the tracks were submerged so that their lower fire-boxes were covered. On Saturday, at 8 p. m. the engines and cars were submerged ten feet or more, and the freight in question was thus damaged. [*Rec.* 14.] Four or five days elapsed from the time when the water began to come up into the town, before it was so high as to submerge the cars and injure the freight. (*Rec.* 11.)

No one expected the water to rise as it did, because it rose about fifteen feet higher than had ever before been known, *Rec.* 16; and the track was 2½ feet or more above previous high water mark. *Rec.* 16, 17, 18.

The rise of the water was at first gradual, and from the direction of Lookout Mountain, by backing; but afterwards it came suddenly from the direction of the Western and Atlantic road, opposite to its former direction, after which it rose very rapidly. On the 6th, the river was getting out of its banks. [*Pryor*: *Rec.* 42, 23.]

There was no apprehension, up to the night of the 7th, that the water would submerge the town. During the night of the 7th, merchants removed their goods, and Phillips, who

that night removed his to the second story of a building standing on ground no higher than the depot, saved them. The water rose into his building on the morning of the 8th. [*Rec.* 13.]

Whitesides is about twenty miles from Chattanooga, Dulong says [25]; and between these places is Wauhatchie, [29], six or seven miles from Chattanooga, [15.] To this point the road was at last submerged. On the morning of the 6th, the cars could have gone to the high ground beyond this point, where the freight would have been safe. [*Stillman*, 15.] The rock that obstructed the road was removed in five or six hours, and a construction-car then ran to Whitesides, and to Running Water bridge, a mile further. [*Dulong*, *Rec.* 25.] Between this point and Chattanooga, eight miles of track was out of water, and a considerable length of side-track. [*Yates*, 30.]

Yates says that on the 6th, the freight cars could have been run out of Chattanooga to a place of safety; but that no reasonable man could then have imagined that it would be necessary. After dusk of the 6th, he says, a train could not have gone out, because cars had to be placed on bridges between Chattanooga and Wauhatchie, to keep them from floating off. [*Rec.* 30.]

Dulong says [*Rec.* 26,] that after the 5th, freight could not have been saved by moving it towards Whitesides or Atlanta, both roads being covered. But this is a mistake, because the construction-car ran on the 6th to Running Water Creek, and returned to Chattanooga after dark. And he admits that a portion of the Knoxville road near Chattanooga was above the highest water. [*Rec.* 26.]

Pryor says that the cars containing freight could not have been moved out to high ground during the 6th, because there was known to be one train, and a locomotive and part of another train, between Whitesides and Chattanooga, and no train could be sent out west until these had come in, which they did not until midnight. [*Rec.* 23.]

But it was not the act of God, at any rate, that placed or delayed *these* trains on the road, after the rock was removed; and they did not pass Whitesides going east until 5 p. m. of the 6th. [*Rec.* 23.] If the freight train which moved at 5.45 and returned, had afterwards followed the construction-car, it would have reached the high ground beyond Whitesides, and the freight would have been safe. Pryor says that there was "lots" of high ground beyond Wauhatchie

and Whitesides, [23], wholly above overflow, crossing a mountain, in fact, and passing through a tunnel.

On the night of the 7th, about midnight, says Pryor, "we moved the loaded cars from the lowest ground *to the highest ground we had*," not supposing that the water would rise so high as to submerge them there. That was not much apprehended until the noon of the 8th, and then they could not be moved to still higher ground, because the water was so deep on the track that it would have put out the fires.

He says there was no higher ground on the Western and Atlantic road, and that permission could not be had to occupy higher ground on the East Tennessee and Georgia road, because the agent of that road was apprehensive about a bridge, and wanted to keep the road open to protect it. *Rec.* 22.

In and near Chattanooga, engines could run until the evening of the 7th. That evening the water was just coming over the track of the Western and Atlantic road, being then a foot deep on the Nashville and Chattanooga track. On the evening of the 7th Jackson pulled out a train of 37 cars to high ground and saved the freight. This high ground was 1,000 yards in length, and three-fourths of a mile from the depot. [*Rec.* 18.] Therefore it is not true, as Pryor states, that there was no higher ground on the Western and Atlantic road; and the tobacco could have been saved, even on the evening of the 7th, by taking the cars out to the high ground, three-quarters of a mile on that road.

Weaver admits that if the flood had been foreseen or its height anticipated, the tobacco could have been sent to a place of safety after the company received it; that it could have been sent either to Atlanta or Knoxville. *Rec.* 17.

Not until the night of the 7th were the cars moved at all; and then only to the highest part of the track. [*Pryor*, 18.]

There is a hill called Cameron's hill in Chattanooga, the highest part of which was two or three hundred feet above the overflow; and the foot of this hill is not more than five or six hundred yards from the depot, There are several other hills, some of them within *two* hundred yards of the depot. *Rec.* 33. There were also houses and stores two stories in height; though none *near* the track, fit to store freight in.

Can it be seriously contended that the agents of the company were not bound, when they found that the cars *were* likely to be submerged, and merchants were conveying their goodsto the second story, to remove the tobacco in question,

from the cars to a place of safety only two hundred yards distant? Was their whole duty performed by leaving it to take its chances in the cars?

The Tennessee is a large, long river, navigable by steamboats to Knoxville, a long distance above Chattanooga. The rise came chiefly from snows and rains above. *Rec.* 11, 13. There is railroad communication with Loudon, on the Tennessee river, 70 miles distant, where the railroad crosses the river; with Knoxville, 110 miles, and with Strawberry Plains, 124 miles from Chattanooga, where the railroad again crosses the river. Telegraph communication with Nashville was interrupted on the 6th, (*Rec.* 27); but it was not shown that it was at any time interrupted between Knoxville and Chattanooga. It is incredible that no advices should have come from above of the unprecedented magnitude of the coming freshet, to put the people of Chattanooga on their guard.

AS TO NEGLIGENCE.

1st. Why was not the tobacco taken to a place of safety, on the high ground beyond Whitesides, on the Nashville and Chattanooga road, after the fallen rock was removed on the 6th? There was ample time to do so, and the means to do it with. The only excuse is that trains were coming eastward, and it could not be moved westward until these had come in to Chattanooga. But there are side-tracks which made it entirely possible to place the freight in safety on the high ground, before the trains coming from the west would reach the same point.

2d. Why did the agents of the road not remove the freight in question over the Georgia road? The alarm of the coming flood was given as early as the night of the 7th, if not before; and then, and for some time after, this freight could have gone out. It is not shown that application was made to that road for the use of its track; and if it had been made and refused, it could have been used nevertheless, with little responsibility. There would have been no injury or damage done, to be paid for; and, at any rate, the permission could been purchased, and should have been, under the stress of the existing necessity. The first duty was to save the freight, at any reasonable expense. Whether the permission could have or could not have been had, it was physically possible to send the freight to a place of safety on that road, and

therefore its damage was not caused by *inevitable* accident, by one that was not foreseen and could not be provided against. The Memphis and Charleston road could have forced the Georgia road to take this freight to a place of safety by paying for the transportation; but it made no effort whatever, in any way, to protect it from damage by means of that road.

3d. It is evident that on the 6th, if not on the 7th, the freight could have been taken to a place of safety, in the cars, on the East Tennessee road. No apprehension of injury by the water was felt until the night of the 7th.

4th. There was no sudden and resistless rush of the water, covering the town and submerging the cars unexpectedly: but the water rose gradually and slowly at the depot, giving ample time to at first have removed the freight by running the cars out upon the East Tennessee or Georgia road, and until after dark, at least, on the 7th, by removing the boxes from the cars and conveying them to the hills. Whitesides says, it was four or five days after water began to come up into the town, before the railroad depots were submerged, so as to injure the freight. *Rec.* 11. On the night of the 7th, Phillips, a merchant, sat up all night measuring the depth of the water as it rose. So also did Fort, *Rec.* 13, 14. They say that no apprehension of injury was felt until that night, and that, consequently, merchants who occupied buildings of only one story in height lost their goods and had them greatly damaged. It is not shown that any attempt whatever to remove the tobacco from the cars was made during that night, nor, indeed, at any other time.

On Friday, the 8th, at 1 p. m. the freight was still uninjured, for the water in the depot had risen only high enough to cover the fire-boxes. On that day Fort removed his books and furniture in a boat, so that even then the tobacco could have been saved in the same way. *Rec.* 14.

On the evening of the 7th, Jackson, the agent of the Western and Atlanta road says, he thought the yard would be submerged, and he pulled out one train of 37 cars to high ground on the track of the East Tennessee railroad. This was $\frac{3}{4}$ of a mile from the depot, only, and 1,000 yards of road was there above overflow. The tobacco in question could have been saved in the same way, and if the agent of one road foresaw the danger and did his duty by thus saving freight, the agents of the other were negligent in not doing

the same, if not at the same time, on account of their track being lower, at least some hours previously, when the water first began to come over.

If a carrier could put goods destructible by water on the alluvial bank of a river, above what he supposed to be, or what had always been, high-water mark, and sit supinely by and see the water rising gradually above that mark, creeping towards and at last around the goods, and when he could easily remove them out of its reach to high land a hundred or two yards off, could say, "let the water cover them. I could not foresee that the river would rise so high. It will be the act of God;" and so excuse himself for their loss, there would be somewhat of a revolution in the law as to common carriers.

Lex ad impossibilia non cogit; but it was quite possible, and not very difficult, on the 7th, and until midnight, to take the boxes of tobacco out of the cars and convey them to the adjoining high ground. The agents of the company did not *think* that the water would rise high enough to injure the freight. They had a right to think so—at the company's risk, not at that of Reeves. It was not in the contract that they should let the tobacco remain there and take the chances of injury. They *could* have saved it, had ample time to do so in two or three different ways, and they not only *did* not save it, but they did not even *endeavor* to do it. But for their negligence or overbold confidence, it would have been put beyond the reach of the water, and the act of God would have had no effect on it. Would the company have been excused if they had stored it in a house, on the lower floor, and let it be ruined there, when they could have conveyed it to the second story, because they did not foresee that the water would rise nearly so high?

The notion that the damage to the tobacco was by the act of God, because He caused the Tennessee river to rise higher than usual, contrary to the reasonable expectations of the railroad agents, is exceedingly absurd. It might with the same reason be said that a man died by the act of God, who, seated on the ground, should refuse when water rising around him had reached his chin, to stand up and keep it from covering him and stopping his breath, because he could not have foreseen that it would rise above his middle.

OF THE LAW AS TO COMMON CARRIERS, AND OF THE INSTRUCTIONS REFUSED AND GIVEN.

The first and second instructions asked for by the corporation and refused, were, that if it was Corbin, a clerk of the company, who assured Price that the tobacco would go out on the evening of the 5th, his promises did not bind the company: and that if Weaver, the agent of the company, did contract with Price that it should do so, and it was not in the course of the business of the company to send a train at that hour, but other hours had been established by the printed rules and regulations, the contract did not bind the company. *Rec.* 36.

The court instructed the jury that if the agent having charge of freights and their transhipment did make such a contract, it bound the company. The testimony shows that the company sent only one freight train each day, and that in the morning; but it *could* certainly send a car in the evening, with the freight train of the Nashville and Chattanooga road, if it chose to pay for the service; and if its agent contracted with a party owning freight to do so, the company would be responsible for all damage caused by the delay. *Rec.* 38.

But if there was no such contract, or the contract was not binding, the company was equally liable on the implied contract, by receiving the goods, and permitting them to be injured while in their care and custody.

The third instruction refused was, in substance, that if the train carrying the tobacco was stopped on the morning of the 6th by the fallen rock, and the washing away of the bridge, and was obliged to return to Chattanooga to send force and implements to put the road in repair, then the delay was inevitable, and would not subject the company for any consequential damages. But this was not correct, because if, after the obstruction was removed, there remained ample time in which to have sent the freight safely to high land, this *further* and unnecessary delay did make the company liable. *Rec.* 36.

The 4th instruction given, therefore, was to that effect, and it was correct. *Rec.* 38, 39.

The 4th instruction asked was that if the damage resulted from a flood, sudden and extraordinary, the Plaintiff would have to prove negligence, to hold the Defendant liable. This was directly contrary to the law, and so the Court charged, by the general statement of the law, and the 1st instruction given.

The 5th instruction asked was, in substance, that if the train could not get on to Stevenson, the Defendant was not bound to take it to high ground elsewhere, if no human foresight could have anticipated the freshet, and if Chattanooga was the proper place to keep trains and start them from, and Wauhatchie and Whitesides were merely way-stations, and not depots.

The 4th instruction given was directly to the contrary.

The Court correctly defined the duty of a common carrier to be, to take all possible care of the goods received by him, and deliver them safely within a reasonable time. It said that he was in the nature of an insurer, and liable unless he should prove that the loss or injury happened from the act of God, or the public enemy, or by the act of the owner of the goods.

The questions in the case were stated to be:

1st. Whether the company received the tobacco for transportation to Memphis.

2d. Was it injured after being so received.

3d. Was the injury occasioned by the act of God.

And the jury were instructed:

1st. That if the tobacco was so received and damaged, the law presumes against the carrier, unless it appears from the evidence that the loss was caused by the act of God, as defined by Lord Mansfield.

2d That if no human care, skill or prudence could have avoided the injury, it was occasioned by the act of God; but if the tobacco was brought within the influence of the freshet by the act of the company or its agents, but for which it would not have been damaged, the damage was not caused by the act of God.

3d. That if the agent of the company made a contract to send forward the tobacco on the evening of the 5th, by not doing which the tobacco was injured by the freshet, when but for the delay it would not have been damaged, the company was liable.

4th. That if the obstructions could have been by diligent effort removed, and the tobacco conveyed to a part of the road where it would have been safe, the injury was not caused by the act of God, man's agency having intervened by the return of the train to Chattanooga, and its remaining there.

5th. That to make loss or damage by a freshet loss or damage by act of God, it must have been so sudden, immediate

and unforeseen, as to leave the carriers no sufficient time or means of escape from its consequences; and that if such was not the case, it was the duty of the company and its agents to save the property by extraordinary exertions; so that it was liable, if the damage could have been prevented by *any* means within their power, and if such means were not resorted to.

All these instructions are fully sustained by the authorities, as the following brief statement will show:

1st. A carrier who undertakes for hire to carry goods, is bound to deliver them at all events, *except damaged or destroyed by the act of God, or the king's enemies*, even though the jury expressly find that they were destroyed without any *actual* negligence on the part of the defendant. A carrier is in the nature of an insurer. *Howard* vs. *Pittend*, 1 *T. R.*, 27, where the loss was occasioned by fire, and there was no negligence. *Siordet* vs. *Hall*, 4 *Bing.*, 607, where damage was done a cargo, by water escaping through the pipe of a steam-boiler, cracked by the frost; and this was held not damage by act of God; BEST, Ch. J., saying, "no one can doubt that this loss was occasioned by negligence. It is well known that frost will rend iron; and if so, the master of a vessel cannot be justified in keeping water within his boiler, in the middle of winter, when frost may be expected." *McArthur* vs. *Sears*, 21 *Wend.*, 189. *Wibert* vs. *New York & Erie R. R. Co.*, 2 *Kernan*, 245. These authorities sustain the first and second instructions.

2d. A common carrier is bound safely to carry the goods to their destination, unless prevented by some cause arising from irresistible force, over which he has no control, and which cannot be guarded against by the watchful exertions of human skill and prudence. *Propeller Niagara* vs. *Cordes*, 21 *Howard*, 24. *Gordon* vs. *Buchanan*, 5 *Yerg.*, 71. *Oakley* vs. *Steam Packet Co.*, 34. *Eng. Com. L. & Eq. R.*, 530.

3d. We shall seek in vain for any case to excuse the loss of goods by the carrier, where it arises from human action or neglect, or any combination of such action or neglect, except force exerted by a public enemy. No matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome is inevitable, yet, if it be the result of human means, the carrier is responsible. *McArthur* vs. *Sears*, 21 *Wend.*, 196. *Trent Navigation* vs. *Wood*, 3 *Esp.*, 127. *Camp-*

bell vs. *Morse*, 1 *Harper, Const. Rep.* 468, where Deft's wagon, in which he was carrying goods for hire, stuck fast in fording a creek, and the water, rising suddenly, damaged the goods; and he was held responsible. *Bason* vs. *Charleston & Columbia St. Boat Co.*, *Id.* 262, where a steamboat grounded from reflux of tide, and in consequence fell over, and the bilge-water, rising into the cabin, injured the goods. *Propeller Niagara* vs. *Cordes*, 21 *Howard*, 7.

See *Read* vs. *Spaulding*, 35 *New York*, 630. *Denny* vs. *N. York Central R. R. Co.*, 13 *Gray*, 481, is not against these cases, because the court there held that when the damages by flood occurred, the Defendants no longer held the goods as common carriers.

In *Redhead* v. *Midland Railway Co.*, 20 *Law Times Rep. N. S.* 628, (4 *Am. Law Review*, 63,) in the Exchequer Chamber, the distinction was accurately stated between the liability of carriers of goods, and that of carriers of passengers: the former being stated as in the cases cited above.

In *Worth* v. *Edmonds*, 52 *Barb.* 40. the court said that it is only causes over which human agency has no control, that enter into the contract, and excuse failure to perform.

4th. By the common law, common carriers are regarded as *insurers* of goods delivered to them for transportation, except when their loss is occasioned by the act of God or the enemies of the Government. *Fillebrown* v. *Grand Trunk Railway Co.*, 55 *Maine*, 462. There the goods were left at the company's depot in Detroit, to be transported by it to a designated place; and the company received them in charge for that purpose. Within an hour or two the depot took fire and was burned, with the goods. The court said that the company was liable as an insurer, and that the legal presumption is, in the absence of all proof, that the owners of goods contract with the carrier under their common law liability. It is for the carrier to show any qualification of the responsibility. See also *Chamberlain* v. *Western Transportation Co.*, 45 *Barbour*, 218. *Propeller Niagara* v. *Cordes*, 21 *Howard*, 26; *Elliott* v. *Russell*, 10 *Johns. R.*, 7; *Richards* v. *Railway Co.*, 7 *Com. B. Rep.*, 839.

5th. As carriers are insurers against fire and marine disaster, of all goods which they carry, except from inevitable accident, it follows that they have, to that extent, an insurable interest in the goods. *Redfield*, § 174. *Chase* v. *Washington Mut. Ins. Co.*, 12 *Barb.*, 595. *Waters* v. *The Monarch*

Life & Fire Ins. Co., 34 *Eng. Law & Eq. R.*, 116. *London & N. W. Railway* v. *Glyn*, 5 *Jur. N. S.*, 1004.

6th. The moment a faulty negligence begins, the carrier becomes an insurer against the consequences therefrom, both ordinary and extraordinary. *Davis* v. *Garrett*, 6 *Bing.*, 716. *Bell* v. *Reed*, 4 *Binn.*, 127. *Hart* v. *Allen*, 2 *Watts*, 114. *Williams* v. *Grant*, 1 *Conn.*, 492. *Crosby* v. *Fitch*, 12 *Conn.*, 410.

7th. On the bare fact of a loss appearing, the carrier is *prima facie* responsible. The owner of the goods injured might otherwise have no proof, and be robbed with impunity. *Bason* v. *St. Boat Co.*, 1 *Harper Const. Rep.*, 265.

8th. If a carrier improperly detains goods, and they are injured by a sudden and extraordinary rise of water, the detention being negligence, he is responsible. To relieve him there must be an entire exclusion of human agency from the cause of the injury or loss. *Michaels* v. *Central R. R. Co.*, 30 *New York R.*, 570. *Read* v. *Spaulding*, *Id.*, 630. In the latter case the goods were injured by a flood, being delayed at a point *in transitu*.

9th. The fact, known to the agents of the company, that the flood was coming, should have increased and stimulated their vigilance and caution, and if by any known means they could have prevented the damage, they should have done so. *Gordon* v. *Buchanan*, 5 *Yerg.*, 82.

10th. The exception of the act of God, or inevitable accident, has by the decisions of the courts been restricted to such narrow limits as scarcely to amount to any relief to carriers. It is in reality limited to accidents which come from a force superior to all human agency, either in their production or resistance. *Redfield*, § 151. *Sherman* v. *Wells*, 28 *Barb.*, 403. *Ferguson* v. *Brent*, 12 *Maryl.* 9.

11th. If goods are damaged by a flood rising higher than ever before, *and which it was negligence not to have anticipated*, and from which the goods *could not* be delivered, after the extent of the rise was seen, the damage will be deemed to have occurred by the act of God, unless the carrier was in fault in not having sooner sent the goods to their destination. If so in fault, he is responsible. *Read* v. *Spalding*, 5 *Bosw.*, 395; 30 *N. York*, 630. *Michaels* v. *N. Y. Centr. Railw.*, 30 *N. York*, 564. *Merritt* v. *Earle*, 29 *N. York*, 115.

12th. When the negligence of the carrier exposes him to what he might otherwise have escaped, he is responsible for losses thus occurring through the combined agency of his

own negligence and of inevitable accident. If his own neglect is the proximate cause of the peril being incurred, he is responsible. If he could have removed the property injured, beyond the reach of flood or fire, and so have escaped from that cause of loss, but did not do so, then, although the flood or fire was the act of God, yet the injury or loss was really caused by his negligence, and the accident was not *inevitable*. *Redfield*, § 151, * 5.

13th. The fact that the carrier has done what is *usual*, is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. *Redfield*, § 151. If he could have prevented the accident by the exercise of due diligence and care, and did not, he is liable. *Wing* v. *N. Y. & Erie R. R. Co.*, 1 *Hilton*, 235.

14th. Of course, the company is responsible for the negligence and other shortcomings of its agents and employees, in regard to freight in their charge. It has long been settled that corporations are liable for acts committed by their agents, in the discharge of the business of their employment, and within the proper range of such employment. *Redfield*, § 130, 2, 6. *Morse* v. *Auburn & Syr. Railw. Co.*, 10 *Barb.*, 621. *Vandegrift* v. *Railway, &c.*, 2 *New Jers. Rep.* 185. *Redfield*, § 153, 2.

15th. The Memphis and Charleston Railroad Company, being a common carrier of freight, it was not necessary to prove that a price was fixed for carrying this merchandise, and still less that it had been paid in advance.—*Story on Bail.*, §§ 495, 502, 505, 586; *Redfield, vol.* 2, *Introd. and* § 158; *Bastard* v. *Bastard*, 2 *Show.*, 81; *Rawson* v. *Johnson*, 1 *East.*, 203; *Knox* v. *Rives*, 14 *Ala.*, 249; *McGill* v. *Rowand*, 3 *Penn. St. R.*, 451.

16th. The defendant's risk had commenced; and that Price was travelling with the freight in no way lessened the Company's responsibility.—*Story on Bail.*, §§ 532, 533, 534, 535, 536.

17th. Neither did the arrangement existing between the Memphis and Charleston, and the Nashville and Chattanooga roads. The former used by agreement the track of the latter, between Stevenson and Chattanooga, and ran its trains on it for conveyance of passengers and freight.—*Story on Bail.*, §§ 502, 506; *Redfield*, § 162, 4; *Foy* v. *Troy and Boston Railw.*, 24 *Barb.*, 382; *Willey* v. *West Cornwall*

Railw, 30 *Law Times*, 261; *Crouch* v. *Great Western Railw.*, 29 *Law Times*, 354. The Memphis and Charleston Railroad Company does not employ the Nashville and Chattanooga Company to carry its freight in the cars of the latter from Chattanooga to Stevenson, but pays for the right to use the road, and has its cars drawn by an engine of the Nashville and Chattanooga Company. The same cars go through to Memphis, and passengers and owners of freight know nothing about these arrangements. To them it is all one road.

ALBERT PIKE,
ROBERT W. JOHNSON,
Counsel of Reeves.

Supreme Court of the U. S.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY

vs.

SAMUEL C. REEVES.

Argument for the Defendant in Error.

ALBERT PIKE,
ROBERT W. JOHNSON.

Supreme Court of the United States.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY

vs.

SAMUEL C. REEVES.

THIS was a suit in the Circuit Court of the United States for the District of West Tennessee, by Reeves against the Memphis and Charleston Railroad Company, for damage to tobacco undertaken to be carried by the Company, caused by negligence and misfeasance of its agents.

On the 26th of March, 1868, the trial of the case by a jury concluded, Reeves obtaining a verdict for $10,946.01.

On the 15th of April, a motion for a new trial was made and overruled.

On the 18th of April a bill of exceptions was tendered and signed.

It does not appear that any exceptions were taken or points reserved during the trial.

The bill of exceptions sets out five *instructions* to the jury, asked by the defendant below, and refused by the Court, covering five pages of foolscap. These the Court refused, and gave a charge in regard to the law in general as to the responsibilities of common carriers, and as to the case in hand upon the facts proven, covering eight pages.

The bill of exceptions covers 122 pages, 109 of which contain all the evidence in the case, being the depositions of many witnesses, with the interrogatories, cross-interrogatories, and papers exhibited and proven, at full length.

The bill of exceptions concludes thus, after setting out the testimony, the instructions refused, and the charge: "The defendant *excepted* to the action of the Court, in refusing the instructions aforesaid, and also in giving the charge aforesaid, and also in overruling his motion for a new trial, and

tenders this his bill of exceptions to the judgment and action of the Court, and prays that the same may be signed and made part of the record; which is accordingly done, this —— day of April, 1868."

If it appears by the record in this case that the defendant below excepted to the refusal of the Court to give his five instructions, and to the charge and instructions given, *at the time* of the refusal and of giving the charge, then the necessity may devolve on the counsel of discussing the instructions given and refused, as applied to the facts of the case; and the Court may have to accept the task of ascertaining those facts by patient examination of the mass of evidence, and then of discovering how far and in what respects the judge below erred in stating the law, or refused to state it correctly.

The bill of exceptions, as we have stated, taken three days after the motion for a new trial was overruled, and twenty-three days after the trial concluded, says, "The defendant *excepted* to the action of the Court in refusing, &c., and also in giving, &c., and in overruling his motion for a new trial; and *tenders* this his bill of exceptions. Does the word "excepted" necessarily or expressly show that the exception was taken during the trial? It is not said that he excepted at the time; and the Court cannot *presume* that it was so, in the absence of any statement, even the most vague, to that effect; on the contrary, as the statement is that he also *excepted* to the overruling of his motion for a new trial, without saying that this was at a different time, the Court must hold that there was no exception at all taken, until that motion was overruled.

The law requires that a bill of exceptions should be tendered *at the trial.* If it be drawn up afterwards, it should be handed to the judge immediately, or in a reasonable time after the trial. *Bradstreet vs. Thomas*, 4 *Peters*, 102.

So, though a bill of exceptions may be signed and drawn up after the trial, the exceptions must be taken *at* the trial, and, when signed, must purport on their face to have been so taken, and to have been then allowed and signed. *Walton vs. The United States*, 9 *Wheat.*, 651.

In *The United States vs. Dashiell*, 4 *Wallace*, 182, the ruling of the Court complained of was excepted to at the trial. It was taken, the Court said, *in express terms, to the particular instruction* in question.

A bill of exceptions must be upon points expressly reserved and excepted to at the trial, otherwise they are waived, as a bill of exceptions originally was, if not presented at the trial. *Meese vs. Levis*, 13 *Penn.*, 386. *Holden vs. Cole*, 1 *Barr*, 303. That was the rule under the Statute of Westminster. If the exception was not stated in writing, and tendered at the trial, it was considered as waived, and the party could not resort to it, after a verdict against him. *Wright vs. Sharp*, 1 *Salk.*, 288, is conclusive on that point. HOLT, Ch. J., said there, "If this practice should prevail, the judge would be in a strange condition: he forgets the exception, and refuses to sign the bill, so an action must be brought: you should have insisted on your exception at the trial: you waive it if you acquiesce, and shall not resort back to your exception after a verdict against you. . . . *the substance must be reduced to writing while the thing is transacting*, because it is to become a record."

No exception lies on account of any error in stating the evidence to the jury, unless the attention of the judge is called to it at the time.—*Cutler vs. Welsh*, 43 *N. Hamp.*, 497.

Very little profit or advantage accrues to the law, by the abandonment of its old principles. It is not safe to trust the memory of a judge engaged in trying a multitude of cases, even for a week, in regard to the evidence given or refused, or to the language he may have used in directing the jury.

We submit that there is no proper bill of exceptions here, on which the Court can act; and that the judgment below must necessarily be affirmed.

For the exception to the decision overruling the motion for a new trial is a mere nullity. Such a decision cannot be excepted to.

If the Court should think that the single word "excepted" has virtue enough to authorize it to conclude that the record shows affirmatively that the exceptions *were* taken on the trial, then other questions must be argued and considered.

We should think it impossible that the Court could give such an effect to the single word "excepted," if it had not been said, in *Blunt vs. Smith*, 7 *Wheat.*, 272, "It is well settled that this Court will not revise the opinion of a Circuit Court, either granting or rejecting a motion for a new trial; but the exception to the charge of the judge, although taken after

a motion for a new trial, *may* have been, *and probably was* reserved at the time the charge was given, *and will therefore be considered.* And in *Brown vs. Clark*, 4 *Howard*, 15, the Court found "some difficulty in noticing the exceptions taken to the instructions in this case, in the form in which they are presented on the record." "It is *matter of doubt*," the Court said, "whether they point to the instructions given and refused to the jury, or the refusal of the Court below to grant a new trial."

We submit to the Court whether it ought not to declare, that if it is "matter of doubt" whether the exceptions were taken at the trial, they will not be considered: that it must *expressly* appear that they *were* so taken: and that this Court will not consider exceptions, if all that can be said on this point is, that they *may* have been, and *probably were*, reserved at the trial. Else what is the avail of declaring that they "must purport on their face to have been taken at the trial," that "it must appear by the record that the exceptions were taken whilst the jury were at the bar;" that it must be stated, when an objection is taken to the ruling of the Court, "that the party *then* and *there* excepted?" *Phelps vs. Mayer*, 15 *Howard*, 160. *United States vs. Breitling*, 20 *Howard*, 252. *Barton vs. Forsyth*, *Id.* 532. *United States vs. Gibert*, 2 *Sumn.*, 22. *Nicoll vs. Am. Ins. Co.*, 2 *Woodb. & Min.*, 530. *Pomeroy vs. Bank of Indiana*, 1 *Wallace*, 592.

In *Lathrop vs. Judson*, 19 *Howard*, 66, it was held that where no exceptions were taken in the progress of the trial, there was nothing on which the Court of Error could act. If the Court cannot act, that is, has no jurisdiction in error, unless the exceptions were taken in proper time, must not that fact, which is the foundation of the jurisdiction, affirmatively and expressly appear?

Nevertheless, counsel often learn that it is not safe to consider their cases so clear on one point, as to need no argument on any other.

We consider, therefore, the questions that may arise, if the Court should hold that it will consider the exceptions in this case, because "they *may have been*, and probably were, *then* and *there* reserved."

We object to the exceptions, as being such as the rules of

the law, and its own rules, will not *permit* the Court to consider.

In the first place, the exceptions here are singularly sweeping and indiscriminate, being to the refusal to give long instructions, and to the giving of eight pages of legal principles and propositions in their stead. It surely will be at some time understood that this Court will not look into a case which thus brings up a mass of instructions given and refused, and in which the party has put his finger on no particular errors. It is directly contrary to Rule No. 4; and it is equally contrary to the law, and to the practice of all appellate courts of respectability. The rule will cease to be disregarded when it is rigidly enforced. To dispense with it, or overlook disobedience of it, on account of particular circumstances, makes it mere *brutum fulmen*. It is but the repetition of a rule of law.

In *Stimpson vs. West Chester R. R. Co.*, 4 *Howard*, 401, the practice of excepting generally to the charge of the Court to the jury was censured; and the writ of error was not dismissed, solely on account of the peculiar circumstances of the case. The Court said, "It is expected that a different course will hereafter be pursued."

A general exception to a charge is insufficient. In *Reynolds vs. Boston and Maine Railroad*, 43 *N. Hamp.*, 588, the Court said, "The objection taken to the charge of the Court, in general terms, is not sustainable. It is quite too broad. If any part of the instructions to the jury was regarded as objectionable, the objection should be taken to that specifically."

In *Franklin Fire Ins Co. vs. Updegraff*, 43 *Penn.*, 358, the errors assigned were that the Court below erred in its answers to each of six points submitted, but did not specify *how* the Court erred, or in what the alleged mistakes consisted. The Court said that this mode of assigning errors was altogether insufficient, compelling the Court to gather the complaints of the plaintiffs in error rather from their arguments than from the record, and tending to obscure the points in controversy.

It must appear what *particular* rulings were excepted to. *Woolf. vs. Chalker*, 31 *Conn.*, 121.

In *Rathbone vs. City, &c.*, 31 *Conn.*, 204, it was held that where the motion for a new trial merely showed that a party claimed that certain evidence was not admissible, in any way to affect the terms of a written instrument; without show-

ing that this claim was made when the evidence was offered, or that the evidence was let in subject to exception, and the claim subsequently made that it should be excluded, or that the Court was requested to charge as to its effect, or the consideration to be given to it; no question was raised which the Court was bound to consider.

There is no doubt that some portions, at least, of the charge and directions of the judge below, in this case, were correct in point of law. If he stated one correct proposition, the exception to his charge falls paralyzed. "If a series of propositions embodied in the instructions of the Court below, be excepted to in a mass, the exception must be overruled, if any one proposition be sound." *Johnson vs. Jones*, 1 *Black*, 209. "Each proposition must be separately and distinctly excepted to. If the propositions are excepted to in mass, and one of them is correct, the exception will be overruled." *Rogers vs. The Marshal*, 1 *Wallace*, 645. *Harvey vs. Tyler*, 2 *Wallace*, 328.

The bill of exceptions is fatally defective in another respect. It contains, not the *facts* established before the jury, but the *evidence* of whatever those facts were, consisting of one hundred and nine pages of depositions and testimony, with the interrogatories, cross-interrogatories, and papers annexed.

In *Graham vs. Bayne*, 18 *Howard*, 60, the Court refused to consider a case, tried below without a jury, and in which the bill of exceptions contained all the evidence. Even agreement of counsel, the Court said, could not substitute evidence of facts in the place of facts, or require the opinion of this Court on an imperfect statement of them. A writ of error, it said, could not by these methods be converted into a chancery appeal, nor a court of error into appellate arbitrators.

In a case for the opinion of the Court, the facts proved at the trial ought to be stated, and not the evidence of facts only. *Palmer vs. Johnson*, 2 *Wils.*, 163.

The evidence in this case is only important, in error, to show how far the instructions refused or given were applicable or inapplicable to the facts. The questions in the case (if the plaintiff in error has succeeded in bringing up any), are purely questions of law. "A bill of exceptions ought to state that evidence was offered of the *facts* on which the opinion of the Court was prayed." *Vasse vs. Smith*, 6 *Cranch*, 226. And it should contain only so much of the evidence as

is necessary to present the legal question raised. *Johnston vs. Jones*, 1 *Black*, 209.

If the Court were sitting in banc, on a special case, upon a motion for a new trial, it might possibly tolerate such a *case*, so huge a mass of testimony, by questions and answers, as the Court is amazed at here. But this is a Court of Error, and ought to protect itself against such records, and protect the parties, too, who have to pay for printing such indigested masses of testimony, under which the records groan, and which are here in defiance of the rules of the Court.

If the Court should accept the burthen sought to be thrown upon it, and undertake the task of ascertaining whether any thing propounded in the five instructions offered by the defendant was good law and should have been given to the jury; and whether any parts, and what parts, of the charge and instruction given, were bad law, and should not have been given, then this question will present itself, *i. e.*, "When a party moves for or objects to instructions, or raises any other question of law, and the instructions moved for are refused, or those objected to are given, or the question of law is decided against him, and he excepts in due time and manner, and in due time his bill of exceptions is signed and made part of the record, and afterwards he moves for a new trial, assigning or not assigning the errors in law as among the grounds for a new trial, does he waive and abandon his bill of exceptions, if or so far as it presents the same questions presented and to be considered on the motion for a new trial; or so far, also, as he might have presented them on that motion: and if so, does he waive it, if it does not present the questions which are to be determined on a motion for a new trial?"

It is quite certain, we think, that by the practice of Westminster Hall a party necessarily waived his bill of exceptions if upon a special case he moved for a new trial upon the same questions of law; and that is all that is necessary for our purposes in this case.

This Court, in the *United States* v. *Dashiell*, 4 *Wallace*, 182, said, "It is insisted that the motion for a new trial in the Court below was a waiver of the exception. The practice is every day otherwise." See also *The United States* v. *Hodge*, 6 *Howard*, 279.

In *Cunningham* v. *Bell*, 5 *Mason*, 173, Mr. Justice Story had said, "The motion for a new trial cannot be entertained, according to the practice of the Court, unless the bill of exceptions is waived. The party has his election, either to proceed upon a writ of error to the Supreme Court, in order to have it determined there, whether the points were correctly ruled at the trial; or, waiving that remedy, to apply here for a new trial. But he cannot be permitted to proceed both ways. The ground for granting a new trial is, that the party is without other remedy. But that is not the case where he files a bill of exceptions; for upon that he can take the opinion of the Supreme Court."

In *Meeker* v. *Boylan*, 3 *Dutcher*, 262, the Supreme Court of New Jersey held, "That although some diversity of practice has prevailed, the true rule is, that where a party who has obtained bills of exceptions applies for a rule to show cause why a new trial should not be ordered on the points contained in said bills, or any of them, it should be made a condi ion of granting the rule, if insisted on by the other party, that, before entering the same, all the bills of exceptions be abandoned, and that the party applying for said rule cannot be permitted to select particular questions of law to be argued and decided on a writ of error. If the rule to show cause is applied for *solely* on points which cannot be raised on a writ of error, the bills of exceptions need not be abandoned."

In *Adams* v. *Andrews*, 15 *Ad. & El., N. S.* 1001, a new trial was moved for on the ground of misdirection by the judge in leaving the case to the jury on a particular question. A bill of exceptions was depending; but on another point. It was asked that the motion might be made, reserving the bill of exceptions. The point on which the new trial was moved for *could* have been included in the bill of exceptions: it was matter of law; and the Court finally said, "Unless you abandon your bill of exceptions we cannot hear you."

So Lord Denman said in *Crotty* v. *Price*, cited in a note to the same case: "You cannot move for a new trial, and have a bill of exceptions on the same point."

Exceptions are waived by the acceptance of an order granting a new trial, on motion, although by the order only a certain specified question is left open.—*Seccomb* v. *Prov. Ins. Co.*, 4 *Allen*, 152.

The Court said, "The exceptions taken by the defendants at the first trial of this case were waived and abandoned by

their acceptance of the new trial, which was granted on their motion. This is the necessary result of the order of the Court setting aside the verdict. The exceptions to the rulings on which the verdict was founded fell with it. In truth, exceptions are in effect nothing more than a motion for a new trial on the ground of error in law, the only difference between the two being that the latter is addressed to the discretion of the Court before which the case was tried, whilst the former lie as a matter of right to the Court for the correction of errors."

This Court has always held that the granting or refusing a new trial is matter of discretion with the Court below, which cannot be reviewed on error.—*Henderson* v. *Moore*, 5 *Cranch*, 11; *Marine Ins. Co. vs. Young*, *Id.*, 187; *Barr* v. *Gratz*, 4 *Wheat.*, 213; *U. S. vs. Daniel*, 6 *Wheat.*, 542; *Blunt vs. Smith*, 7 *Wheat.*, 272; *Brown vs. Clarke*, 4 *Howard*, 15; *Freeborn vs. Smith*, 2 *Wallace*, 176; see *Edmonson vs. Machell*, 2 *T. R.*, 4; *Hutchinson vs. Piper*, 4 *Taunt.*, 556.

This is, of course, the case where the finding of the jury against evidence, or any ground whatever other than error in law, is the ground on which the new trial is asked. When the judge sits to review and revise the finding of the jury, he must decide as he would have decided if he had been a juror. There cannot be one rule of decision for him and another for them.

But when error in law is complained of, the Court which is asked to grant the new trial acts for the most part as a Court of Error. Nevertheless, if on the whole injustice has not been done, the Court will not grant a new trial, even if there were error in rulings or directions; and therefore it does to that extent exercise a discretion.

The motion for a new trial in this case assigned no reasons or grounds whatever. Nothing was excepted to afterwards except the instructions given and refused, and the overruling of the motion.

A motion for a new trial is not the proper mode for correcting errors in law, other than the admission or rejection of evidence. To correct *these*, exceptions are used, which "are in effect nothing more than a motion for a new trial on the ground of error in law, the only difference between the two being that the latter is addressed to the discretion of the Court before which the case was tried, while the former lie as a matter of right to the Court for the correction of errors."—*Seccomb vs. Provincial*, &c., 4 *Allen*, 154.

Originally, in England, an action was triable only in the court in which it was brought. But Magna Charta provided that assizes of *novel disseizin* and *mortancester* should, instead of being tried at Westminster, in the Superior Court, be taken in their proper counties; and for this purpose, justices were to be sent into every county, once a year, to take these assizes there. The statute of Nisi Prius (13 *Edw.*, 1, ch. 30), provided the form for summoning juries to the Superior Court, as the general course of proceeding. It was, "We command you, *venire facias coram just. nost. apud Westmins. in*, &c., *nisi talis et talis, tali die et loco ad partes illas venerint duodecim*, &c. Thus the trial was to be had at Westminster, only in the event it should not previously take place in the county, before the justices appointed to take the assize. Had there, it was called a trial at Nisi Prius. If had at Westminster, it was called a trial *at bar*.

The Nisi Prius record in the King's Bench awarded a writ of *venire facias*, commanding the sheriff of the county where the facts were alleged to have occurred, to summon a jury to try the issue in K. B. The writ was sued out, but not used. The practice of the Court was to *suppose* that the jurors had been summoned upon it, and failed to appear. And on this fictitious default, the record gave the jurors further time to appear, at a day named, *nisi prius venerint* the judge or judges of assize to try the issue in the proper county. Then a *distringas* issued (or in the C. B. a *habeas corpora*), on which the jurors were summoned to appear for the trial of the cause at Nisi Prius.

Originally the trial took place at Westminster. But this practice has been from a very remote period disused. The record of the proceedings made up for trial usually contains a *Nisi Prius* clause, and is denominated the Nisi Prius Record. This is delivered to the judges of assize and *Nisi Prius*, and serves for their guidance as to the nature of the issue to be tried.

The Nisi Prius Trials are held twice a year, and always in the time of the vacation of the Courts of Westminster Hall. Out of London and Middlesex, where the Chief Justice presides, persons are appointed by temporary commission to try the cases, among whom are usually, for each circuit, two judges of the Superior Courts.

In causes of great difficulty and consequence, the trials are allowed to be taken before the four judges of the Superior Court. These are trials *at bar*.

The verdict, when given, is afterwards drawn up in form, and entered on the back of the "*Nisi Prius Record.*"

If, at the trial, a point of law arises, either as to the legal effect or admissibility of the evidence, the judge decides it. If the party dissatisfied wishes the decision revised, and is content to refer it to the Superior Court from which the issue was sent down, *i. e.*, the Court in Banc, he moves, *in that court*, for a new trial. But the Nisi Prius judge is often himself a member of that Court, and the party may prefer, for that reason, to have the revision of some Court of Error. In that case, he puts the question of law on record, by a bill of exceptions, taken pending the trial, in a form marked out by the Statute of Westminster 2, 13 Edw. I, ch. 31. This being taken, the cause proceeds to verdict, and the party for whom it is given is entitled, as in the common course, to judgment upon it, in the Court in banc; for that Court takes no notice of the bill of exceptions. It is noticed only in the appellate court, on error.

By the English practice, the bill of exceptions was no part of the record till after judgment. The cause proceeded and judgment was given, as if there was no bill of exceptions. It was carried into a Court of Error, and *there* annexed to the record; if it had been part of the record, there would be no occasion to send for the judge to acknowledge his seal; when this is done, it is for the first time annexed to the record. Being for the benefit of the party who tendered it, and remaining in his possession, it is in his breast to employ it or not. 1 *Sellon* 470. *Gardner vs. Baillie*, 1 *Bos. & Pul.*, 32.

If there is a demurrer to evidence, it is argued and decided in the Court in banc; and the judgment there given may be brought before a Court of Error.

If there is a special verdict, it is, when settled, entered on record, and the QUESTION OF LAW on the facts found is argued in banc, and decided there, and the judgment may go up on error.

If the object is merely to obtain the decision of the Court in banc, *and it is not wished to put the legal question on record*, in a view to a writ of error, then the more common, because the cheaper and shorter course is to take a general verdict, subject to *a special case;* that is, to a written statement of all the facts of the case, drawn up for the opinion of the Court in banc, by the counsel and attorneys on either side, under correction of the judge at Nisi Prius. Then the party for whom the general verdict was given, is of course not en-

titled to judgment, till the Court in banc has decided on the special case; and the judgment is ultimately entered according to the result of that decision.

Within a fixed time, the party against whom the jury have found, may move the Court in banc to grant a new trial. He may not have obtained a special verdict, or demurred to the evidence, or tendered a bill of exceptions. He is at liberty, *therefore*, after the trial, and during the term fixed, to move the Court in banc to grant a new trial, either because the judge misdirected the jury, or admitted or refused evidence contrary to law; or on the ground that the verdict is contrary to the evidence, or on insufficient evidence; or on other grounds which we need not pause to repeat. See *Stephens on Pleading*, app. note 30; and pp. 78 to 89, 92 to 96, 118 to 121.

"It is a great principle of law, that the decision of a jury, upon an issue of fact, is, in general, irreversible, and conclusive."—*Stephen*, 96. But, nevertheless, the jury try and find with the aid of the Court, and if it plainly appear that the discretion of the jury has not been legally or properly exercised, a new trial may be granted by the Court in banc; and there is no appeal from the decision on an issue of fact, except in the way of motion for new trial. If the party would have the question of the sufficiency of the evidence to warrant a verdict tested, he had originally either to obtain a special verdict, or to demur to the evidence, until the practice of making up a special case grew up, on which there could be a motion for a new trial. So far as such a special case set out and was intended to obtain a review of errors in law, that is, of errors committed by the judge, it was a substitute for the bill of exceptions. Of course it was not so as to errors or mistakes committed by the jury, in finding contrary to the evidence, disregarding instructions, or by misbehavior or any other matter that was not error of the judge.

The special case being, as to rulings and directions of the judge deemed to be erroneous, a substitute for the bill of exceptions, by which the party claiming to be aggrieved might have a speedier and cheaper remedy, it necessarily followed that as to *these* errors, he could not have *both* remedies. He could not take his bill of exceptions not to be noticed by the Court in banc, and require the Court also to settle a special case for reconsideration of the same questions.

For, first, it is not to be believed that the judge would

consent to undergo the double labor of stating the facts and rulings twice, once in a bili of exceptions, and again in a special case; and, second, the Court in banc would hardly permit the nisi prius judges to send up a special case to be decided on under a threat from the party that if the Court should not reverse the rulings at nisi prius, he would take a writ of error on his bill of exceptions.

The proceedings at nisi prius terminate with the verdict. After the four days allowed by the practice of the Court, judgment may be obtained; and after it is signed in banc, the unsuccessful party may bring his writ of error. If a special case is sent into banc the judgment is not given until it is disposed of. Now, if the bill of exceptions and special case present the same questions of law, and in the latter the Court in banc approves the rulings at nisi prius, how can the party go back to the error there, after submitting the same matter to the four judges in banc. The error has by this become the error of the Court in banc, of the Court of K. B., C. B., or the Exchequer. The former error is displaced and made unimportant by this; and yet, upon the writ of error this error of the Court in banc cannot be enquired into. The special case is not entered of record, and no writ of error can be brought upon it; and the party, in the supposed case, would stand in the Court of Error in the attitude of a party objecting to the decision of *one* judge, after appealing from that to the four judges in banc, and having their decision on it; and, while precluded from impeaching the later and final decision, going back to the original one which the later one affirmed, and leaving the latter in full force, final and conclusive in the premises on the case stated.

The law and practice would have been in a very singular condition, if the Court of K. B., for instance, should, by sustaining this practice, have said to the party against whom verdict was given, "If we decide against you on the special case, you cannot have a writ of error to our decision; and upon that alone the judgment would be final. But if you have also taken a bill of exceptions for the same matter, you may, after *we* have decided, have your writ of error, not on account of the error committed by us in sustaining the rulings at nisi prius, but on account of those rulings themselves, as if we had decided nothing at all; and so you may, perhaps, reverse our judgment."

Another thing is to be remembered in considering this

question. In error, upon the bill of exceptions, if any error of law were found to exist, the judgment was reversed, without any regard to the general justice of the verdict, or the fact, if it were so, that the error in law had really wrought no injury, and the verdict would have been the same if it had not been committed: in other words, the Court in Error had no discretion. But in the special case, the Court looked at the whole case, and granted or refused the new trial at its discretion. If, therefore, there were both a special case, and a bill of exceptions, the new trial might be refused, notwithstanding the errors in law, and the judgment afterwards reversed on account of them; and yet both Courts have decided rightly, according to the law; the decision in banc, in other words, being reversed because it was *right*, and the strict law of the case prevailing over the justice of it.

In England the question has been deemed so plain as to need no argument. When it was held by Lord Chief Justice Campbell and his associates, in *Adams vs. Andrews*, 15 *Ad. & Ell.*, N. S. 1001, that where the point on which the new trial was moved for, *could* have been included in the bill of exceptions,—*i. e.*, was matter of law—the Court would not hear the party unless he abandoned his bill of exceptions, the Court expressed astonishment at the idea that the party could reserve his right to use the bill of exceptions, and refused to sanction so mischievous a practice: and Lord Denman, in *Crotty vs. Price*, did not deem it necessary to say more than this: "You cannot move for a new trial and have a bill of exceptions on the same point." If "the practice is every day otherwise," anywhere in this country, that practice cannot make law, and it is but the indulgence in an error and an abuse.

Sellon (1 *Prac.* 474) says, "If the matter in question be of such moment and nicety as to induce either party to think it may be advisable to carry it to the *dernier resort*, in case the judgment of the Court should be unfavorable to him, he must not consent to take a case, but must bring it on in the shape of a special verdict."

In *Fabrigas vs. Mostyn*, 2 *W. Bla.*, 929, a bill of exceptions had been tendered and sealed at the trial, on a question of law. After the verdict a new trial was moved for, on the point of law contained in the bill of exceptions. "But by *De Grey*, Chief Justice and *tot. Cur.* The bill of exceptions is ordained by the Legislature to be in nature of a writ of error, and it would be highly unbecoming in us to stop it *in*

transitu, unless you will waive the bill of exceptions: which the defendant declining to do, the Court refused to hear his counsel on the point of law."

So, in *Roberts vs. Roberts*, 2 *Chitty R.* 272, a new trial was moved for, a bill of exceptions having been tendered at the trial. *Per Curiam:* You must make your election, either to abandon the bill of exceptions or this motion. This motion cannot be granted, unless the bill of exceptions is abandoned. Peake decided to abandon the bill of exceptions.

The error of the judge, in misdirecting the jury, calls for correction as a matter of right, and a motion for a new trial on this ground is an appeal to the well settled principles of law. 1 *Graham and Waterman on New Trials*, 262. *Calcraft vs. Gibbs*, 5 T. R. 19. *Brooke vs. Middleton*, 3 *Bing.* 319.

Chitty states the law in the same way, and that a new trial is a matter of *right*, where the judge has improperly received or rejected *any* material evidence, or incorrectly directed the jury on the law applicable to the facts; unless it clearly appear that the error could not have had any effect on the jury, or did not influence the verdict. 4 *Chitty, Gen. Prac.*, 30. *Tatham vs. Wright*, 6 *Nev. & Man.*, 151.

In *Bernasconi vs. Farebrother*, 3 *Barn. & Adol.*, 372, it was a question whether, in granting the new trial moved for, the Court could limit the inquiry on the second trial to one point. Lord Tenterden said, "In the particular case now before the Court, the objection which arose as to the admissibility of the evidence, might have been taken by bill of exceptions. *The application for a new trial was substituted for a bill of exceptions.* Now, if there had been a bill of exceptions in this case, and the judgment were that the evidence had been improperly received, the Court of Error could only have awarded a *venire de novo*, sending the whole to a new trial; and as the application for a new trial is substituted for a bill of exceptions, we think that, by analogy to that proceeding, the defendants are entitled to a new trial generally."

If the motion for a new trial is, in such cases, a *substitute* for the bill of exceptions, how can the party *also* have the bill of exceptions?

If a special case were settled, in respect of, and intended to present to the Court in banc none of the errors of law relied on for reversal and set forth by the bill of exceptions, but the question whether the jury decided according to the evidence, or whether they misbehaved, or any other ground affecting the jury, for which a new trial could be granted, it

might be more plausibly claimed that the unsuccessful party could with propriety take the opinion of the Court in banc, on these questions, upon the special case, and, if the Court refused a new trial on these grounds, could then fall back on his bill of exceptions and bring his writ of error. In that case, would not the Court have required him either to rely wholly on the errors of law, or to present his whole case in the special case, for the consideration and action of the Court in banc? Would not the same evil and absurdity exist, as where the same error is assigned both in the special case and in the bill of exceptions, if a party could split his case in halves, present one half of it only to the Court in banc, and when it had decided its half rightly against him, seek to reverse its judgment on account of errors which it had not committed, and on questions which he might have presented to it, but had not given it opportunity to consider?

On an application for a new trial, the only question is, whether, under all the circumstances of the case, the verdict be or be not according to the justice of the case; for though the judge may have made some little slip in his directions to the jury, yet, if justice be done by the verdict, the Court ought not to interfere and set it aside. *Estwick vs. Caillaud*, 5 T. R., 425.

One finds it difficult to conceive, therefore, how the Court in banc, on a special case, could have consented to consider *part* of the case. Was it ever known that a party said to a Court of Westminster Hall, "I wish for a new trial, on part of the matter at Nisi Prius. The rulings of the judges there upon the admission and rejection of the evidence, and their directions to the jury of which I complain, I reserve by bill of exceptions, to be availed of in an appellate court. I only ask you to decide on what are not errors of law." Would not such a proposition have been deemed extraordinary and impudent?

In our system, the motion for a new trial is made to the same judge before whom the case was tried. There is no Court in banc, of more or other judges, under whose control and direction the case is deemed to be tried. When a trial is had before this single judge, it is claimed that he errs in matters of law, and the party fancying himself aggrieved takes his bill of exceptions. Can it be tolerated that he should then come before the same judge and say, "I have excepted to your rulings, and am prepared to have them corrected by a higher court, by writ of error. I hold this over

you *in terrorem*. Now reconsider what you have decided; admit these decisions to be incorrect, or I resort to a writ of of error." Would not the judge with propriety answer: "You can correct the error I have committed, if there be any, by writ of error. You have taken the steps necessary to enable you to do so. You have no right, therefore, further to appeal to and annoy me. Pursue your remedy. If you propose to ask me to again consider my decisions, you must waive and abandon your bill of exceptions. You cannot ask me for a decision to-morrow, and still avail yourself of your exceptions to what I decided yesterday."

In England, a party could ask a reconsideration in banc, by the four judges, of the decision in Nisi Prius, of one. For such a reconsideration was, as we have seen, really the exercise of an appellate jurisdiction. It deserves consideration whether a single judge can be asked to reconsider his own opinion, at all, and especially when the party complaining has already procured from him a bill of exceptions, to carry the case to a higher court, and there have his decision reviewed.

The inclination of the Courts always is to the making of law; but it would be better if they would be satisfied with the exposition of it; since the zeal for reformation of the law often ends in its depravation. It has certainly done so in the case of those courts which have entertained writs of error to reverse decisions of courts refusing new trials, and, we say it frankly, but with entire respect and deference, which have held that a bill of exceptions is not waived by a motion for a new trial on the same grounds, because "the practice is every day otherwise," and have considered questions raised by bill of exceptions, because "they may have been and probably were reserved at the trial."

We do not propose to analyze the mass of testimony in this case, in order to extract from it the small number of material facts. To say the least, it was sufficient to warrant the jury in finding that the injury was caused, not by the act of God, but by the negligence and delays of the agents of the Railroad Company.

Nor will we enter at large upon the field of inquiry pre-